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United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 73-1783, 73-1784, 74-1050 and 74-1051.

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated.

Appellees.

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION.

TURTLE CREEK AREA SCHOOL DISTRICT,
Appellant in Nos. 73-1783 and 74-1050.

CHURCHILL AREA SCHOOL DISTRICT ALLEGHENY COUNTY,
Appellant in Nos. 73-1784 and 74-1051.

(D. C. Civil Action No. 71-538.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued February 28, 1974

Before HUNTER and WEIS, *Circuit Judges* and BECKER, *District Judge*

R. Stanton Wettick, Jr., Attorney for Appellees.

M. E. Evashwick, James C. Evans, J. Robert Maxwell, Attorneys for Appellants.

Opinion of the Court

(Filed April 18, 1974.)

PER CURIAM:

The underlying action which gave rise to these appeals is a class action brought against the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education, the Allegheny County Board of School Directors, the Allegheny Intermediate Unit Board of School Directors and various individuals as officials of these bodies. The complaint was filed on June 9, 1971 and alleged that the defendants intentionally and knowingly drew boundary lines for the new consolidated school districts in the central eastern area of Allegheny County, and specifically for the General Braddock Area School District, in a way that perpetuated and maximized racial segregation in violation of the equal protection clause. On May 15, 1973, the district court found in favor of the plaintiffs and ordered the Commonwealth defendants to prepare and adopt a comprehensive plan of school desegregation for that area of Allegheny County.

No appeal from this decision was filed by any of the named defendants, but on June 12, 1973, the Turtle Creek Area School District ("Turtle Creek"), a local school district likely to be affected by the desegregation plan, filed a petition to intervene in the case as a party defendant in order to take an appeal. On June 13, 1973, Churchill Area School District ("Churchill"), a similarly situated local school district, took the same action. These petitions to intervene were denied by the district court on June 13, 1973 and these denials as well as various exceptions to the May 15, 1973 judgment of the district court itself form the basis for appeals No. 73-1783 and No. 73-1784.

Subsequent to the filing of these appeals, the Commonwealth defendants submitted a proposed desegregation plan to the district court. Turtle Creek and Churchill as well as the other school districts affected under the plan, thereupon filed new petitions to intervene. The district court permitted intervention at this point for the limited purpose of presenting argument on the issues of 1) whether the Commonwealth's plan complied with the district court's order of May 15, 1973 and 2) whether the Commonwealth abused its discretion in choosing the plan it submitted for approval. However, it refused to permit the school boards to intervene as defendants for all purposes.[1] This denial as it relates to Turtle Creek and Churchill, is the basis for appeals No. 74-1050 and No. 74-1051.[2] These appeals and the earlier ones have been consolidated since they involve the same issues.

While the parties that have brought this appeal have undertaken a broad attack upon the district court's judgment of May 15, 1973, the crucial threshold question is whether their petitions to intervene were properly denied. If they were, Churchill and Turtle Creek are not parties to the action and cannot appeal the judgment of the district court.[3] We have concluded that the denial of these petitions was proper, and as a result, the appeals will be dismissed.

---

[1] Had general intervention been permitted, most of the school boards would have sought to reopen the record so that they could present arguments in opposition to the district court's May 15, 1973 judgment of liability.

[2] Naturally, since the plaintiffs have not filed an appeal, our decision in no way affects the district court's order *granting* limited intervention.

[3] While Churchill and Turtle Creek rely primarily upon their asserted status as intervenors to establish their right to appeal the district

(Footnote continued on following page)

As the Supreme Court has recently made clear, it is within the discretion of the district court to deny a petition to intervene if it is not timely. *NAACP v. New York*, 413 U.S. 345 (1973). In the instant case, the untimeliness of the various petitions is clear. The first petition was not filed until June 12, 1973, two years after the case was originally filed, six months after the trial, and almost a month after the district court's opinion and order were filed.

(Footnote continued from preceding page)
court's judgment, they also suggest that this right is established under Federal Rule of Civil Procedure 19 which provides for compulsory joinder of indispensable parties. This argument begins with the local school districts' assertion that they are indispensable parties and that the district court erred when it rejected the named defendants' motion to have them so named. They go on to contend that this question can be raised by this court *sua sponte* so that even if they do not qualify as intervenors, we should still bring them into the action under Rule 19 and permit them to attack the judgment of the district court.

This argument is not meritorious. While courts of appeals have raised questions as to the absence of indispensable parties *sua sponte*, J. MOORE, FEDERAL PRACTICE ¶19.19, at 2582 they have done so only when an appeal had already been properly brought by one of the parties to the action. *See* cases cited *id.* note 11. We do not feel that it is appropriate to take the same approach in cases such as this, where the only "appeal" to this court has been initiated by non-parties. In these circumstances, we can reach the indispensable party question only if we reach out on our own initiative and upset proceedings before the district court that have proved satisfactory to all of the present parties to the case. This would create an unwarranted interference with the work of the district courts.

It may be that a non-party's rights are so affected in a particular case that he should have the right to initiate an appeal. However, he must first make himself a party to the action by filing a petition to intervene under Rule 24 and by meeting the requirements that exist for successful intervention. We will not create a procedure that would allow him to circumvent these requirements by petitioning this court directly for a decision that declares him to be an indispensable party under Rule 19.

Moreover, the petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date. On May 19, 1972, (more than six months before trial) the Attorney-General of Pennsylvania sent identical letters to Turtle Creek and Churchill that informed them of the suit and noted that the relief requested would have an important effect on the future of their districts.[4] The letter then indicated that the Attorney-General's position in the litigation would have to reflect the interests of the Commonwealth as a whole and that as a result it probably would not reflect the interests of the local school districts. It closed with the following suggestion:

> "I, therefore, urge you to intervene in this action immediately if you wish the viewpoint of your school district and your constituents to be represented and presented before the trier of fact and of law."

This letter, at the very least, put the school districts on notice to be alert to the likely necessity for intervention. Yet despite this clear warning, no petition to intervene was filed until June 12, 1973, six months after the December 1972 trial. Since the necessity for intervention was apparent at least by time of trial,[5] the failure of Turtle Creek and Churchill to act until months later makes the

---

[4] A copy of the amended complaint accompanied the letter.

[5] By that time the following papers were of record and available for the school districts' review: Plaintiffs' proposed stipulation of facts; plaintiffs' pretrial statement; County defendants' pretrial statement; Commonwealth defendants' pretrial statement; the pretrial stipulation; and plaintiffs' summary of opinion evidence.

Supreme Court, U
FILED
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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

No. 73-2038

October Term,

CHURCHILL AREA SCHOOL DISTRICT and TURTLE CREEK AREA SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; and COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Respondents.

APPENDIX

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Churchill Area School District.

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M. E. EVASHWICK,
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BATAVIA TIMES, APPELLATE COURT PRINTERS
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cluding the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent *de jure* segregation through the fixing of school district boundaries and that the language was not to be construed to permit *de facto* segregation on the basis of race, religion or national origin which is by law prohibited. Exhibit 40, T. 271-276.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of an area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Exhibits 12, 60

C. *School Districts Established by the State and County Boards.*

13. In the central eastern area of Allegheny County, each of the City of Pittsburgh and north of the Monongahela River, the County and State Boards established the General

Braddock Area School District; the School Districts of Turtle Creek, Swissvale Area, Churchill Area and East Allegheny which border on the General Braddock Area School District; and the Edgewood School District which is situated within approximately one mile of the General Braddock Area School District. Exhibits 59, 13, 4, 10.

14. The General Braddock Area School District came into being on July 1, 1971 and serves the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. This School District composed of Braddock, North Braddock and Rankin was proposed in the organization plan adopted by the County Board pursuant to Act 150 on October 7, 1968 and was approved by the State Board on May 9, 1969. Prior to July 1, 1971, the School Districts of Braddock, North Braddock and Rankin served the Boroughs of Braddock, North Braddock and Rankin, respectively. S. 15, 21, 24, 26; Exs. 10, 13, 37.

15. The Turtle Creek School District serves the area consisting of the geographic limits of the Boroughs of East Pittsburgh and Turtle Creek. This School District was established pursuant to Act 150. S. 15; Exs. 9, 10, 37.

16. The Swissvale Area School District serves the area consisting of the geographic limits of the boroughs of Braddock Hills and Swissvale. This School District was established pursuant to Act 150. S. 15; Exs. 9, 10, 37.

17. The Churchill Area School District serves the area consisting of the geographic limits of the municipalities of Chalfont, Churchill, Forest Hills and Wilkins. This School District was established pursuant to Act 299. S. 15; Exs. 4, 10, 13, 36.

18. The East Allegheny School District serves the area consisting of the geographic limits of the municipalities of East McKeesport, North Versailles, Wall and Wilmerding. This School District was established pursuant to Act 299. S. 15; Exs. 4, 10, 13, 36.

19. The Edgewood School District serves the area consisting of the geographic limits of the Borough of Edgewood. This School District was established pursuant to Act 150. S. 15; Exs. 9, 10, 13, 37.

D. *Characteristics of Braddock, North Braddock and Rankin.*

20. Braddock, North Braddock and Rankin are economically depressed, declining communities. T. 47, 48, 66, 120, 135-137.

21. The housing within these three municipalities is old and substandard. Exs. 23, 49; T. 50, 134-135.

22. The residents of these municipalities are poor and less educated. Exs. 20, 50, 51, 56.

23. The municipal taxes of these municipalities are higher than average. Ex. 25.

24. The recreational and shopping facilities within these three municipalities are extremely limited. T. 49-50, 65, 134, 135.

25. The populations of these three municipalities have been rapidly declining at an accelerated pace and becoming increasingly older. From 1930 to 1970 the combined populations of Braddock, North Braddock and Rankin declined from 44,067 to 23,335 and the median age of these popula-

tions increased from approximately 27 years in 1940 to approximately 35 years in 1970. Exs. 15, 16.

26. The Boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. T. 47, 48, 64-66, 120, 220, 221, 225-228; Findings of Fact 20-25.

E. *Population Trends—Race.*

27. The populations of Braddock, North Braddock and Rankin are becoming increasingly non-white at an accelerated rate. From 1930 to 1970 the percentages of the non-white populations of Braddock, North Braddock and Rankin increased as follows: Braddock—11.54% to 36.33%; North Braddock—2.91% to 11.04%; Rankin—19.56% to 35.48%; and combined populations—9.7% to 24.7%. The largest increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin has occurred in the last two decades as is shown in the table below which sets forth the increase in the percentage of non-white population for each of the past four decades:

	1930-1940	*1940-1950*	*1950-1960*	*1960-1970*
Braddock	.7%	4.0%	7.3%	12.8%
North Braddock	.2%	1.8%	2.4%	3.8%
Rankin	2.2%	7.3%	5.0%	1.4%
Combined[3]	.8%	3.7%	4.1%	6.4%

Ex. 15

28. The increase in the percentages of the non-white populations of Braddock, North Braddock and Rankin is

[3] This shows the increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin.

attributable almost entirely to a declining white population within these municipalities. From 1930 to 1970 the white populations of these three boroughs decreased as follows:

	1930 White Population	*1970 White Population*	*Loss*
Braddock	17,096	5,527	11,569
North Braddock	16,290	9,641	6,649
Rankin	6,391	2,462	3,929
Combined Population	39,777	17,630	22,147

Ex. 15.

The greatest portion of the loss in the white populations of these municipalities has occurred in the last two decades as shown in the table below which sets forth the average yearly decline in the white population for each of the past four decades:

Average Yearly Decline

	1930-1940	*1940-1950*	*1950-1960*	*1960-1970*
Braddock	101	228	438	399
North Braddock	109	120	176	260
Rankin	55	92	152	94
Combined Loss	265	440	766	744

Ex. 15

29. Over the past four decades there has been an even greater increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin. From 1930 to 1972 the non-white percentages of the public school populations of these municipalities increased as follows:

Opinion.

% of Non-White Enrollment

	1930	*1960*	*1970*	*1972*
Braddock	8%	41%	72%	80%
North Braddock	2%	8%	16%	22%
Rankin	17%	34%	51%	57%
Combined	7.1%	23.7%	38.7%	44.5%

Ex. 18

Yearly Increase in Non-White Enrollment

	1930-1960	*1960-1970*	*1970-1972*
Braddock	1.1%	3.1%	4%
North Braddock	.2%	.8%	3%
Rankin	.6%	1.7%	3%
Combined	.5%	1.5%	3%

Ex. 18

30. This substantial increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin is attributable almost entirely to a steady decline in the white public school populations of Braddock, North Braddock and Rankin over the past 42 years:[4]

White Public School Populations

	1930	*1960*	*1970*	*1972*
Braddock	3,085	1,096	332	198
North Braddock	4,400	2,481	1,955	1,576
Rankin	1,617	685	398	295
Combined	9,102	4,262	2,685	2,069

Ex. 18

[4]From 1930 to 1972 the black public school populations of Braddock, North Braddock and Rankin increased from 696 to 1656.

petitions ultimately filed untimely. *See NAACP v. New York, supra.* The petitions for intervention filed in June and October of 1973 were properly denied.

The appeal will be dismissed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

***Sur* Petition for Rehearing**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 73-1783/4
74-1050/1

DOROTHY HOOTS, etc., *et al.*,
Appellees.

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Appellants.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by

Appellants, Turtle Creek Area School District and Churchill Area School District

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

BY THE COURT,
JAMES HUNTER, III,
Judge.

Dated: June 4, 1974.

Hearing on Conference of Counsel

(Filed March 16, 1973.)

Before: Judge Gerald J. Weber.

R. Stanton Wettick, Esq. Appear for Plaintiff.

Burton D. Morris, Esq., Mark Widoff, Esq., Thomas M. Rutter, Jr., Esq. Appear for Defendant.

Hearing begun March 15, 1973 9:30 A.M.

Hearing adjourned to .....

Hearing concluded C.A.V. 10:35 A.M.

Stenographer None

Co. Unit to file brief in 30 days.

State will file no brief.

Ct. to enter preliminary order.

Opinion

(Filed May 15, 1973.)

WEBER, *J.*

INTRODUCTION.

This is a suit under the federal Civil Rights Act in which plaintiffs, as representatives of a class, allege that residents of the Borough of Braddock, North Braddock and Rankin, in Allegheny County, Pennsylvania have been deprived of rights, privileges and immunities guaranteed them by the laws and Constitution of the United States by being forced to attend and send their children to a

racially segregated school district created by the actions of the various defendants in preparing, approving and adopting plans of reorganization and consolidation of school districts in Allegheny County, particularly that creating the General Braddock Area School District, known as Administrative Unit No. 16, within whose boundaries these plaintiffs reside, and the approval of reorganization of surrounding school districts made at about the same time.

A great many of the factual issues in this case were resolved by agreement and stipulation. The statistical data submitted into evidence of the trial was received largely without objection. The defendants submitted two documents as exhibits but offered no testimony. As a result we find the facts to be almost entirely in accord with those findings proposed by plaintiffs' counsel after the close of the evidence. The findings are sufficiently detailed so as to allow us to proceed without a further narrative account of the background of this litigation.

FINDINGS OF FACT.

A. *Parties.*

1. Plaintiffs include Addrallace Knight and Barbara Smith.

2. Plaintiff Addrallace Knight is a black woman who has resided in the Borough of Braddock, Pennsylvania for 20 years and is the mother of three children presently enrolled in the public schools of the General Braddock Area School District in grades 2, 4 and 12, of three children formerly enrolled and still eligible to be enrolled in the public schools of the General Braddock School District.

and of two children in college who graduated from the School Districts of Braddock and the General Braddock Area, respectively. [T. 2, T. 30.

3. Plaintiff Barbara Smith is a black woman who has resided in the Borough of Braddock for 28 years and is the mother of children enrolled in the public schools of the General Braddock Area School District in grades 3, 4, 5, 9, 10 and 11. T. 63, 64.

4. Plaintiffs Addrallace Knight and Barbara Smith instituted this suit to alter the boundaries of the General Braddock Area School District. T. 30, 63.

5. Named Plaintiffs bring the suit as a class action on behalf of all parents and children residing in the boroughs of Braddock, North Braddock and Rankin. Named Plaintiffs' claims are typical of the claims of the class and named Plaintiffs will fairly and adequately protect the interests of the class. T. 40, 46, 100, 101.

6. Defendant Commonwealth of Pennsylvania has the duty under Article III, Section 14 of the Pennsylvania Constitution to maintain and support a thorough and efficient public school system. (Paragraph 35 of Plaintiffs' Complaint, Admitted).

7. Defendant Commonwealth of Pennsylvania has the ultimate power, authority and responsibility to create school districts and to establish and alter boundaries of the areas served by said school districts. (Paragraph 36 of Plaintiffs' Complaint, Admitted).

8. Defendant Pennsylvania State Board of Education ["State Board"] is a state administrative board charged

[1] "T." ____ refers to the page of the Transcript of Trial.

with the general supervision and control of the educational interests of the Commonwealth of Pennsylvania, and Defendant W. Deming Lewis is the Chairman of that Board. (Paragraphs 33 and 34 of Plaintiffs' Complaint, Admitted).

9. Defendant Allegheny Intermediate Unit Board of School Directors is an administrative body which became operative as of July 1, 1971 and is charged with providing the essential services formally provided by the Allegheny County Board of School Directors ["County Board"] and with the administration of the program of services of Intermediate Unit 3 comprising all school districts in the County of Allegheny outside of the City of Pittsburgh, and Defendant Edward X. Hallenberg is the President of such Board. (Paragraphs 38(b) and 38(c) of Plaintiffs' Complaint, Admitted).

B. *School Reorganization Legislation and Standards.*

10. During the 1960's the Pennsylvania Legislature on three occasions enacted legislation to reorganize the administrative units (*i.e.* school districts) in Pennsylvania's public school systems.

(a) the first Act—the Act of September 12, 1961, P. L. 1283, No. 561, 24 P. S. 2-281 *et seq.* (Act 561)—directed each county board of school directors to prepare on or before January 1, 1963 a plan of organization of administrative units for the County for review by the State Council of Education. 24 P.S. 2-282, 2-283.[2] S.1

(b) Act 561 was superseded by the Act of August 8, 1963, P. L. 564, No. 299, 24 P. S. 2-290 *et seq.* (Act 299).

[2] The reference to "S" ____ means the paragraph of the Stipulation of Facts, Ex. 61 of the record.

Act 299 directed each county board of school directors to prepare on or before July 1, 1964 a plan of organization of administrative units for the county and directed the State Council of Basic Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise in the best interest of the educational system of the Commonwealth, provided that these plans met certain requirements specified in Act 299. 24 P. S. 2-292, 2-293. S.2. In preparing reorganization plans pursuant to Act 229, the county boards were not bound by any proposals contained in reorganization plans prepared pursuant to Act 561. 24 P. S. 2-292. In dealing with school districts which had previously entered into a written agreement for the establishment of a joint school or department, however, the county boards were prohibited from proposing any administrative units which in whole or in part comprised less than all of the school districts joined by such agreement. 24 P. S. 2-292.

(c) Act 299 was superseded by the Act of July 8, 1968, P. L. ____, No. 150, 24 P. S. 2400 *et seq.* (Act 150). Act 150 directed each county board of education to prepare within 90 days a plan of organization of administrative units limited to those school districts within the county which were not in an administrative unit established as a school district under Act 299. 24 P. S. 2400.2. S.14.

11. Acts 299 and 150 both provided for the plan of organization of administrative units to conform to standards for approval of administrative units adopted by the State Board and directed the State Board to prepare such standards, taking into account the following factors: topograph, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing ad-

ministrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P. S. 2400.1 and 2400.2; 24 P. S. 2-291 and 2-292. Both Acts also provided that no plan of organization of administrative units should include any proposed school district with a pupil population of less than 4000 unless the factors listed above were considered by the State Board (or Council of Basic Education) as requiring approval of a plan in which any district contained a pupil population of less than 4000. 24 P. S. 2400.3, 24 P. S. 2-293.

12. Pursuant to the above provisions of Acts 299 and 150, the State Board adopted Standards for Approval of Administrative Units. These Standards, *inter alia* provided that:

> (a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.
>
> (b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

A letter from the Superintendent of the Department of Public Instruction advised the County Boards, in-

a school district composed of these five school districts. A report prepared by the County Board in connection with the preparation of this plan stated that a district composed of these five municipalities would make possible the placement of every pupil—grades 7, 8 and 9—in a bona fide junior high school and that all senior pupils could have an expanded high school program. S. 1, Ex. 35 (p. 10); T. 83-84.

44. A third alternative was one school district composed of Swissvale, Rankin, Braddock Hills and perhaps Edgewood and a second school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh. A school district composed of Swissvale, Rankin, Braddock Hills and Edgewood as of 1967 would have had an enrollment of 3940 of which approximately 14% would have been non-white and a school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh would have had an enrollment of 5280 of which approximately 24% would have been non-white.[10] Ex. 17.

All witnesses familiar with this area of Allegheny County testified that for geographic reasons alone, Rankin should be in the school district which included Swissvale rather than a school district which included Braddock. The feasibility of placing Rankin in the school district which included Swissvale is so obvious that William Rea, a member of the State Board who heard the appeal of the Rankin School District from the County Board's plan which combined Braddock, North Braddock and Rankin into one

[10] None of these municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 protecting established school districts did not preclude the Board from proposing the alternative suggested in finding of fact 44.

school district, asked if there was any way the State Board could find out why the County put Rankin with Braddock and North Braddock "rather than the logical geographical thing, looking at the map, of Swissvale because it seems to me that the State Board needs to have some reasons here." T. 88, 131, 134; Ex. 54 (p. 23); Ex. 59.

45. A review of the map of this central eastern area of Allegheny County indicates that at least from the standpoint of transportation, other alternatives (in addition to the three mentioned above) to a school district composed of Braddock, North Braddock and Rankin could also have been selected. Ex. 59, Ex. 11.

H. *Refusal to Properly Consider Race.*

46. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this Court finds that in establishing boundary lines for school districts, the racial composition of the student body of the proposed school district is an important factor to be considered to maximize the social and educational benefits which accrue from attending a racially integrated school system and to minimize the foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools. T. 162, 163, 232-234, 264-5; Exs. 58, 41.

47. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this court finds that there is no educational or other valid justification for disregarding racial criteria in establishing school district boundary lines. T. 162-168, 234-239, 271-275.

48. In preparing and adopting the plan of organization of administrative units which combined Braddock, North

Braddock and Rankin into one school district pursuant to Act 150, the County and State Boards refused to give consideration to the foreseeable and avoidable adverse educational and racial effects that could result form the concentration of black pupils within this proposed school district. S. 19, 23.

49. This court finds that if the County and State Boards had properly considered race in preparing and approving a plan or organization of administrative units for Allegheny County pursuant to Act 150, these Boards would not have approved a plan which combined Braddock, North Braddock and Rankin into a single school district. In support of this finding, this court relies on the uncontradicted testimony of plaintiffs' expert witnesses that had race been properly considered, for educational reasons alone the Boards would not have concentrated the black residents of this area within this one school system. T. 162, 166-168, 244, 268-271, 276-277.

50. This Court accepts the uncontradicted testimony of plaintiffs' expert witnesses that on the basis of the demographic data which was clearly available, the State and County Boards knew or should have known they were creating a racially segregated school district as of the dates they proposed and approved a school district composed of Braddock, North Braddock and Rankin. T. 219-224, 230-232, 251-253, 276-277.

Demographic data available to these Boards as of such dates included information on the racial composition of the public schools of Braddock, North Braddock and Rankin and surrounding school districts (S. 6, 17, 22, Ex. 47) as well as data of the U. S. Census Bureau and public schools

of Braddock, North Braddock and Rankin showing the population trends by race of the public school populations and general populations of Braddock, North Braddock, Rankin and surrounding areas. (See, for example, Exhibits 15, 16 and 18).

Merely by considering the data collected by the County Board and Department of Public Instruction showing the white and non-white enrollment in each school district within Allegheny County as of 1964 and 1967 (Exhibit 17), the County and State Boards should have known that a school district of Braddock, North Braddock and Rankin would be a racially segregated school district that would become increasingly non-white. As of 1967, Braddock, Rankin and North Braddock ranked 1, 2 and 7 of the 61 school districts in Allegheny County (excluding Pittsburgh) in terms of percent of non-white enrollment and, as the table below shows, were the only school districts within this central eastern portion of Allegheny County with a significant concentration of non-white students:

Percent of non-white students

	1964	*1967*
Braddock	56.69	63.84
North Braddock	14.22	19.62
Rankin	44.7	51.30
East Pittsburgh	14.15	6.08
Turtle Creek	0.00	0.00
Swissvale	5.5	9.91
Edgewood	0.00	0.00
Churchill	.17	0.41
East Allegheny		9.88

Ex. 17

51. The County and State Boards maximized racial segregation within the public schools of this central eastern portion of Allegheny County by creating a school district composed of Braddock, North Braddock and Rankin. As of the dates on which the County Board prepared and State Board approved the combining of the school districts of Braddock, North Braddock and Rankin into a single school district, no other combination of school districts within this portion of Allegheny County would have created a school district (of at least 4,000 pupils as required by Act 150) with as large a percentage of non-white enrollment as the combination of Braddock, North Braddock and Rankin. See Ex. 17.

I. *The Boards' plan disregarded Standards for School Reorganization as well as recognized educational standards.*

52. The plan of organization of administrative units adopted by the County and State Boards pursuant to Act 150 for the central eastern portion of Allegheny County failed to meet many essential requirements of Act 150, the State Board Standards for Approval of Administrative Units ("State Board Standards"), policies of the Department of Public Instruction and Human Relations Commission of Pennsylvania, and recognized educational standards. T157-162, 235-241, 262-265, 268-272, 277-281. Examples of essential requests that weren't met include:

(a) Act 150 required that each proposed school district have a pupil population of at least 4000 (unless a smaller school district was required). See Finding of Fact 11. The plan adopted by the County and State Boards

completely disregarded this requirement by combining the school districts of East Pittsburgh and Turtle Creek which had a 1967 combined enrollment of 1898,[11] by combining the school districts of Braddock Hills and Swissvale which had a 1967 combined enrollment of 1925 and by permitting to stand alone the school district of Edgewood which had a 1967 pupil population of 928, Ex. 37; T. 159-161, 239-241. Even the school district of Braddock, North Braddock and Rankin violated the spirit of this requirement because as of 1967 it was obvious that the enrollment within these districts (which was slightly in excess of 4000) was declining rapidly and that the pupil population of this district would stabilize at a population far below 4000.[12]

(b) The State Standards was well as recognized educational standards require creation of school districts capable of providing a comprehensive program of education. Finding of Fact 12e. Because of the concentration of non-white children from poor and educationally-deprived homes within the district, the General Braddock Area School District did not meet this requirement according to uncontradicted testimony of plaintiffs' expert witnesses. T. 161, 162, 241-246, 277-281.

(c) Guidelines of the Department of Public Instruction and the Human Relations Commission of Pennsylvania in effect prior to the County Board's preparation

[11] It is noted that as of 1964 the County Board recognized that a school district of Turtle Creek and East Pittsburgh would not comply with the state pupil population requirements and therefore it refused to consider such a school district. Exs. 45, 6. At that time Turtle Creek-East Pittsburgh public. ? ? ? ?

[12] State Board standards permitted consideration of population changes. See Finding of Fact 12a.

of the plan of administrative units pursuant to Act 150 (as well as accepted educational standards) recognize the importance of the presence of children from varied backgrounds within every school building. Such policy specifically provides that any action which fosters racial segregation in the public schools is against the public interest and should not be taken by any public agency. Ex. 58, 41. T. 264, 265. The County and State Boards acted contrary to these guidelines (as well as the policy expressed in the letter from the Superintendent of the Department of Public Instruction stating that *de facto* segregation on the basis of race is by law prohibited—(see finding of fact 12b) by concentrating black children and children from poor, educationally deprived homes within one single school district. T. 158-159, 234-238, 241-246, 258-265, 268-276, 283-284.

(d) The County and State Boards also ignored the State Board Standard requiring maximum utilization of existing buildings by separating East Pittsburgh from North Braddock because of North Braddock's need for school building situated within East Pittsburgh. Finding of fact 12e. Exs. 6, 7, 45.

53. Alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with the provisions of Act 150, the State Board Standards for Approval of Administrative Units and recognized educational standards. Such alternatives include those set forth in findings of fact 42-44. T. 157-162, 241-2, 244-246.

54. In view of the availability of these alternatives, the decision of the County and State Boards to create a

school district composed of Braddock, North Braddock and Rankin was contrary to recognized education standards, the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, and policies of the Department of Public Instruction and Human Relations Commission. T. 157-162, 241-242, 244-246.

55. These alternatives previously referred to that would have been more consistent with the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, recognized education standards and the policies of the Department of Public Instruction and Human Relations Commission would have permitted the black public school population of Braddock, North Braddock and Rankin to attend substantially more integrated public school systems. Ex. 17, Findings of Fact 42, 44, T. 158-162.

J. General Conclusions.

56. On the basis of Findings of Fact 27 through 55 and the uncontradicted testimony of plaintiffs' expert witnesses, this Court finds that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. T. 247, 276, 219-227, 246-247, 276-277, 262-271.

57. On the basis of Findings of Fact 20 through 55 this Court finds that the natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into one school district was to perpetrate, exacerbate and maximize racial segregation within the public schools of this central eastern portion of Allegheny County.

Average Yearly Decline in White Public School Populations

	1930-1960	*1960-1970*	*1970-1972*
Braddock	66	76	67
North Braddock	64	53	190
Rankin	32	29	52
Combined	162	158	309

Ex. 18

31. This Court relies on the uncontradicted testimony of expert witness John A. Finger that there is no basis for believing that the characteristics which caused the decline in the white populations of Braddock, North Braddock and Rankin over the past years have changed; that while all white families may not move out, new white families will not move in and there will be fewer and fewer young white children; that it is extremely likely that these municipalities have reached the tipping point of becoming primarily a black area; and that Braddock and Rankin will become 100% black or nearly so and North Braddock will develop the same characteristics unless remedial action is taken as to the General Braddock Area School District because of the relationship of school population to residential neighborhood stability.[5] T. 219-228.

32. This Court finds that the creation of the General Braddock Area School District is an unstable influence on

[5] This testimony is also supported by the data in Exhibit 16 which shows that the white populations of Braddock, North Braddock and Rankin are much older than the black populations of these municipalities; that the younger segments of the populations are becoming increasingly non-white; and that, in fact, the non-white percentage of the combined populations of these municipalities between the ages of 0-14 is twice as great as the non-white percentage of the combined populations over the age of 44.

the public school populations of Braddock, North Braddock and Rankin that will cause an increasing number of white students to leave the public schools of Braddock, North Braddock and Rankin.[6] T. 40, 104, 288.

33. On the basis of findings of fact 20 through 32, this court finds that there is every reason to believe that the white public school populations of Braddock, North Braddock and Rankin will continue to decline by at least the same number as over the past several years and that the enrollment of the General Braddock Area School District will be almost entirely black within the next five to ten years.

F. *Comparison with Neighboring Municipalities.*

34. The area served by the General Braddock Area School District has perhaps the highest concentration of

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[6] In its 1936 Underwriter's Manual the FHA recognized that the development of a neighborhood is strongly influenced by the type of schools:

> "if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." *Bradley v. School Board of City of Richmond, Virginia*, 338 F. Supp. at 215-216. Also see *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. at 20-21.

Note also that in the last two years the annual decline in the white public school populations of Braddock, North Braddock and Rankin doubled primarily because in North Braddock (the source of 76% of General Braddock Area School District's white students) the annual decline in white students increased from 53 to 190. See Finding of Fact 30.

Also see *United States v. Board of School Commissioners, Indianapolis, Ind.*, 332 F. Supp. at 676, where the Court said:

> "The undisputed evidence in this case . . . is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible."

blacks of any area within Allegheny County served by a single school district. As of 1970 Braddock, Rankin and North Braddock ranked first, second and eleventh, respectively, of the 129 municipalities within the County in terms of their percentage of black residents. Ex. 14.

35. This central eastern portion of Allegheny County is generally divided along racial lines. The black residents of this portion of the County are contained within Braddock, North Braddock and Rankin and largely excluded from other municipalities within the area. This is illustrated by the following table which sets forth the black populations as of 1970 for Braddock, North Braddock, Rankin and the other municipalities within the area:

	Black	*Total*	*% Black*
Braddock	3,139	8,682	*36.16*
North Braddock	1,194	10,838	*11.02*
Rankin	1,351	3,817	*35.39*
Chalfont	12	1,370	.88
Churchill	5	4,690	.11
East McKeesport	26	3,233	.80
Braddock Hill	293	2,494	11.75
East Pittsburgh	116	3,006	3.85
Edgewood	66	5,101	1.29
Forest Hills	26	9,561	.27
North Versailles	1,025	13,416	7.64
Swissvale	567	13,891	4.10
Turtle Creek	15	8,308	.18
Wall	32	1,265	2.53
Wilkins	49	8,479	.56
Wilmerding	94	3,218	2.92

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36. Pervasive racial discrimination which restricts the housing opportunities of blacks in the eastern portion of Allegheny County is a factor which accounts for the concentration of blacks within Braddock, North Braddock and Rankin. T. 42-43, 70-77; Affidavits of Brock, Cox, Decostro, Strader.

37. The percentage of non-white enrollment of the General Braddock Area School District is much greater than that of any of the surrounding school districts. As of 1971 the percentages of non-white enrollment of the General Braddock Area School District and surrounding school Districts were as follows:

General Braddock Area School District	44.98
Churchill	.78
Edgewood	6.08
East Allegheny	8.89
Turtle Creek	1.3
Swissvale	9.6

Ex. 17

38. The General Braddock Area School District also has a much greater non-white enrollment than almost every other school district within the entire county. As of 1971 of the 46 school districts operating within Allegheny County (excluding Pittsburgh),[7] only 15 districts had a non-white enrollment in excess of 5%, only eight districts had a non-white enrollment in excess of 10%, only 4 districts had

[7] Pittsburgh is excluded because for organization of administrative units and other purposes the jurisdiction of the County Board covers all Allegheny County school districts except Pittsburgh.

a non-white enrollment in excess of 30%,[8] and only two districts—Wilkinsburg and General Braddock Area—had a non-white enrollment in excess of 40%. Ex. 17.

39. The school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks within the Braddock and Rankin School Districts. These surrounding districts proposed to the County and State Boards mergers that would include almost any school districts in the vicinity other than Braddock and Rankin. S. 4, 7, 9, 10, 17, 18; Exs. 5, 7, 8; 35A (p. 11), 42, 46, 47; T. 82-85, 93-100, 107-108, 120-122.

40. The General Braddock Area School District is racially identifiable as a black school district. Findings of Fact 34-39; S. 17, 18; T. 40, 46, 84, 93-95, 98-100, 104, 246, 247, 268-272, 276.

G. *Alternatives to a school district of Braddock, North Braddock and Rankin.*

41. Braddock, North Braddock and Rankin are not geographically isolated; they are easily accessible to most other municipalities within this central eastern portion of the County; and they have not historically developed the characteristics of a single community (defined by the Standards for Approval of Administrative Units—Ex. 12—as

[8] Of the four districts with a non-white enrollment in excess of 20% (Wilkinsburg, General Braddock Area, Clairton and Duquesne), the General Braddock Area School District was the only newly created school district. The boundaries of the School District of Wilkinsburg, Clairton and Duquesne are identical to the municipal boundaries of these municipalities and these boundaries were not affected by school reorganization within Allegheny County. (Exhibit 13)

one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or social reasons). Thus alternatives to a school district comprised of Braddock, North Braddock and Rankin were available to the County and State Boards. Exs. 8, 59; T. 45, 38, 116-119, 131, 133-134.

42. One such alternative was a school district composed of Braddock, North Braddock, Rankin, East Pittsburgh and Turtle Creek. Such a school district as of 1967 would have had an enrollment of 5894 of which approximately 27% would have been non-white. Ex. 17.

The plan of organization of administrative units prepared by the County Board pursuant to Act 299 proposed a school district composed of these five municipalities. The minutes of a meeting of the County Board which discussed this proposed school district state that all members of the Board agreed that this was a satisfactory unit and that this unit met the standards for pupil population, utilization of existing buildings and capabilities of providing comprehensive education. Also a report prepared by the Department of Public Instruction described a unit consisting of these five municipalities as "a natural".[9] S. 3, Exs. 8, 45.

43. A second alternative was a school district composed of Braddock, North Braddock, Rankin, Braddock Hills and East Pittsburgh.

The plan of reorganization of administrative units prepared by the County Board pursuant to Act 561 proposed

[9] None of these five municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 which protected established school districts did not preclude a district composed of these five municipalities. Ex. 4, 10.

Order

AND NOW, this 15th day of May, 1973, this Court having found that the County and State Boards acted contrary to the Constitution in adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into a single school district, it is hereby ordered and directed that:

(1) Defendants Commonwealth of Pennsylvania, The Pennsylvania State Board of Education, and W. Deming Lewis shall prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation for the central eastern area of Allegheny County to remedy the Constitutional violations found by this Court, which plan shall become final unless objected to by plaintiffs within 20 days after it is filed with the Court.

(2) Such plan shall meet the following standards:

(a) the plan shall alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts.

(b) the plan shall be an educationally sound and practical plan of desegregation that promises now and hereafter to achieve the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County, taking into account the practicalities of the situation.

(c) the plan shall set forth the dates on which it shall go into effect, which dates shall be set as early as possible.

(3) Defendants Allegheny Intermediate Unit Board of School Directors, and Edward Hallenberg, its President, shall assist in the preparation of the plan in all respects within their special area of responsibility and to the fullest extent render the benefits of their expertise and knowledge of local facilities and resources so that the terms of this order may be carried out by the other Defendants.

(4) In preparing said desegregation plan it is anticipated that defendants will consider the factor of racial balance along with other educationally relevant criteria and that the plan submitted by defendants will be consistent with the policies of the Department of Public Instruction and Human Relations of Pennsylvania relating to school integration.

(5) Defendants shall give each school district whose boundaries may be altered by said school desegregation plan the opportunity to be heard prior to the adoption of a final plan.

(6) Until said school desegregation plan is finally approved by this Court, defendants are hereby enjoined and restrained from taking any action, directly or indirectly, that may in any way limit or otherwise affect any school assignment options that could possibly be considered or proposed by any parties to this action.

(7) This Court expressly retains complete and continuing jurisdiction to modify this final judgment and decree on its own motion or on motion of any party.

(8) This judgment and decree shall take effect immediately.

GERALD J. WEBER,
United States District Judge.

ENTERED at Pittsburgh in the Western District of Pennsylvania this 15th day of May, 1973, at 4:30 o'clock P. M.

cc: R. Stanton Wettick, Esq.
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Petition to Intervene as Party in Interest

(Filed June 12, 1973.)

To the Honorable, the Judges of said Court:

The petition of Turtle Creek Area School District, on behalf of said school district and on behalf of its taxpayers, residents and school children, respectfully represents as follows:

1. That the Turtle Creek Area School District is a school district of the third class, under the laws of the Commonwealth of Pennsylvania.

2. That said school district is operated for and on behalf of its taxpayers, residents and school children.

3. That on May 15, 1973, a final order by the Honorable Gerald J. Weber, Judge, United States District Court for the Western District of Pennsylvania, was made directing the defendants in the above-entitled case, to realign or redistrict school districts abutting or contiguous to the General Braddock School District, to carry out the Court's order.

4. That said Turtle Creek Area School District is one of the abutting or contiguous school districts that may be affected by said Order of Court.

5. That said Order of Court would affect the operation conduct and the interests of the Turtle Creek Area School Districts, as well as its taxpayers, residents and school children, in the following respects:

a) It may result in higher taxation on properties owned by residents and taxpayers, and cause other economic hardships;

b) It may result in large scale transportation costs to the Turtle Creek Area School District, which it does not presently have;

c) It may cause longer school hours, by reason of said transportation of children to or from the Turtle Creek Area School District;

d) It may result in turbulance and disorders within Turtle Creek Area School District.

6. Turtle Creek Area School District was not represented at the hearing of the original case, nor made a party to said proceedings.

7. Turtle Creek Area School District is of the opinion that the defendants in said case did not truly and fully represent the interests of the taxpayers, residents and school children of the Turtle Creek Area School District.

8. The defendants did not see fit to raise constitutional and jurisdictional questions to protect the interests of the Turtle Creek Area School District, and other school districts similarly situated.

9. The defendants in the above-entitled case seem to be unwilling or are not interested in pursuing the appeal of said case on jurisdictional and constitutional grounds to a higher and final determination to protect and resolve the interests of the Turtle Creek Area School District, and other school districts similarly situated.

10. Turtle Creek Area School District feels that it, and other school districts similarly situated, would more seriously and fully protect the taxpayers, residents and school children of the Turtle Creek Area School District, and

school districts similarly situated, by pursuing an appeal in the matter, as is being done in other state jurisdictions in similar cases.

11. Turtle Creek Area School District is of the opinion that it and other school districts similarly situated would conduct a fuller, better and stronger defense on behalf of the taxpayers, residents and school children of the Turtle Creek Area School District and school districts similarly situated, by being allowed to intervene and be a party-defendant in the above-entitled matter.

WHEREFORE, your petitioner respectfully petitions this Court that the Turtle Creek Area School District, and other school districts similarly situated and of similar interest, be allowed and permitted to intervene and become party-defendants in the above-entitled case, and to pursue the conduct of the case as the intervening party-defendant sees fit.

M. E. EVASHWICK,
Solicitor for Turtle Creek Area School District.

Affidavit

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared M. E. EVASHWICK, ESQ., Solicitor for Turtle Creek Area School District, who after being duly sworn according to law, deposes and says the facts contained in

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58. On the basis of Findings of Fact 27 through 51 this Court finds that by combining the three municipalities within which most of the black population of the area resides into a single school district the County and State Boards built on the pattern of residential segregation within this central eastern portion of Allegheny County, the inevitable effect of which was to maintain, perpetuate, exacerbate, maximize and otherwise impose racial segregation in the public schools of this central eastern portion of the County.

59. On the basis of Findings of Fact 27 through 55 this Court finds that the County and State Boards devised this plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin. This Court can find no other explanation for the Boards' creating a school district composed of Braddock, North Braddock and Rankin and defendants have offered no explanation as to why this school district was created to refute the testimony of plaintiffs' expert witnesses that the creation of this school district cannot be justified under recognized educational standards, the provisions of Act 150 or the Standards for Approval promulgated by the State Board.

60. Because the State and County Boards in devising this plan of organization of administrative units for the central eastern portion of Allegheny County were influenced by the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin be-

cause of the high concentration of blacks within these municipalities, race was a factor, at least indirectly, in the formation of the school district composed of Braddock, North Braddock and Rankin.

61. The Record contains absolutely no evidence showing that the school district boundaries established in the County and State Boards' plan of organization of administrative units are rationally related to any legitimate purpose and this Court finds that such boundaries do not promote any valid state interest. T. 158-162, 239-242, 244-246, 277-281; Findings of (Illegible)

DISCUSSION—JOINDER OF NECESSARY PARTIES.

The only issue of law seriously contested in these proceedings have been the necessity of joinder of the school districts surrounding the General Braddock Area School District.

Fed. R. Civ. P. 19(a) requires the joinder of a party (1) whose absence prevents the granting of complete relief to the present parties, and (2) whose interest is such that his absence may impair his ability to protect that interest or submit the present party to multiple or inconsistent obligations.

The absence of the surrounding school districts does not affect the complete relief available to existing parties. The power to draw school district boundaries rests solely with the Commonwealth of Pennsylvania and the Pennsylvania State Board of Education. Local school districts have no power or control over their own boundaries. They can be altered at anytime by the Commonwealth. The surrounding school districts have no legal

right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed. R. Civ. P. 19 which can be affected by the outcome of this litigation.

While surrounding school districts may be concerned with the results of this litigation and even be affected by it, this does not require their joinder under Fed. R. Civ. P. 19.

In *Griffin v. State Board of Education,* 239 F. Supp. 560 [E. D. Vir. 1965] where public agencies were enjoined from paying tuition grants for use by private schools which practiced racial discrimination, it was held not necessary to join the private school's name. "The overriding answer is that no complaint is made against the schools themselves. The complaint is against the payers and not the ultimate recipients of the grant. It is the power to give, not the right to receive, which is in issue." (p. 566). Permissive intervention was allowed to such private schools in *Poindexter v. Louisiana Financial Assistance Commission,* 258 F. Supp. 158 [E. D. La. 1966], *aff'd.,* 389 U. S. 571 [1968], the trial court stating: "These schools are not necessary parties, as far as the constitutionality of the tuition grant system is concerned." (p. 167).

We may note that the surrounding school districts were aware of this suit. The Attorney General of the Commonwealth of Pennsylvania sent letters on May 19, 1972 to four surrounding school districts informing them of the action and enclosing a copy of the complaint. He advised them that if relief were granted the present boundaries of their districts would undoubtedly be changed. He urged their intervention. (Ex. 54, T. 4). Also, a week before trial the Attorney General sent telegrams advising them that he

would again move to compel their joinder, and urging them to intervene (T. 3-4). None chose to act.

We do not overlook the possibility that the adjoining districts may be required to be joined at some further stage of the proceedings, if such are necessary under our retention of jurisdiction of this matter. We shall provide in our order that the Commonwealth and the State Board allow the adjoining districts to be heard on the matter of developing a plan of desegregation.

We have, therefore, denied defendants' motions based on failure to join a necessary party under Fed. R. Civ. p. 19 up to the present stage of the proceedings.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U. S. C. 1331(a), 1343 (3) and (4), 2201 and 2202; 42 U. S. C. 1983 and 1988.

2. A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools. *Kelly v. Guinn*, 456 F. 2d 100, 105-108 [9th Cir. 1972], *petition for cert. filed*, 41 U. S. L. W. 3114 [U. S. Sept. 12, 1972] [No. 72-341]; *Davis v. School District of City of Pontiac, Inc.*, 443 F. 2d 573 [6th Cir. 1971], *cert. denied*, 404 U. S. 913 [1971]; *Spangler v. Pasadena City Board of Education*, 311 F. Supp. 501, 521 [C. D. Cal. 1970], and cases cited therein.

3. School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools because of community sentiment or the wishes of a majority of voters. *Bradley v. Milliken*, ___ F. 2d ___ [6th Cir. Dec. 8, 1972 slip opinion], *aff'g*, 345 F. Supp. 914 [E. D. Mich. 1972], same 338 F. Supp. 582, 593 [1972]; *United States v. School District 151 of Cook County, Ill.*, 432 F. 2d 1147 [7th Cir. 1970] aff'g. 301 F. Supp. 201 230 [N. D. Ill. 1969], *cert. denied*, 402 U. S. 943 [1971] and cases cited therein; *Johnson v. San Francisco Unified School District*, 339 F. Supp. 1315, 1341 [N.D. Cal. 1971] and cases cited therein; *Spangler v. Pasadena City Board of Education*, *supra*, 311 F. Supp. at 523 and cases cited therein.

4. School authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 25-26 [1971]; *Bradley v. Milliken*, *supra*, 338 F. Supp. at 592 and cases cited therein; *Kelly v. Guinn*, *supra*, 456 F. 2d at 105-107; *United States v. School District 151 of Cook County, Ill.*, *supra*, 301 F. Supp. at 522.

5. The County and State Boards acted contrary to the Fourteenth Amendment by selecting school district boundaries for the central eastern portion of Allegheny County which conformed to and built upon patterns of residential segregation in this area of the county. *Bradley v. Milliken*,

supra, ___ F. 2d ____, slip opinion, at 9-10; *Davis v. School District of Pontiac, supra, Sloan v. Tenth School District of Wilson County, Tenn.*, 433 F. 2d 587, 589 [6th Cir. 1970]; *United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okla.*, 429 F. 2d 1253, 1259 [10th Cir. 1970]; *Brewer v. School Board of City of Norfolk, Va.*, 397 F. 2d 37, 42 [4th Cir. 1968]; *Spangler v. Pasadena City Board of Education, supra*, 311 F. Supp. at 522.

6. When the natural and foreseeable consequences of actions taken by school authorities are to preserve segregation within the public schools or to hamper its removal, such actions violate the Fourteenth Amendment. *Bradley v. Milliken, supra; United States v. Texas Education Agency*, 467 F. 2d 848-864 [5th Cir. 1972] and cases cited therein at n. 23; *United States v. School District 151 of Cook County, Ill., supra*, 404 F. 2d 1125; *Spangler v. Pasadena City Board of Education, supra.*

7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. *Bradley v. Milliken, supra*, 345 F. Supp. at 939-940; *Kelly v. Guinn, supra; Davis v. School District of City of Pontiac, Inc., supra*, 443 F. 2d 573 at 576; *Sloan v. Tenth School District of Wilson County, Tenn., supra*, 433 F. 2d at 590; *United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okla., supra*, 429 F. 2d at 1259 and cases cited therein; *Johnson v. San Francisco Unified School District, supra*, 339 F. Supp. 1341 cases cited therein; *Spangler v. Pasadena City Board of Education, supra*, 311 F. Supp. at 522.

8. While the state may have no affirmative duty to eliminate public school segregation when it has done nothing to create it, nevertheless when it seeks change, it must proceed in a fashion that will lessen previously existing school segregation. *Bradley v. Milliken, supra; United States v. Texas Education Agency, supra,* 467 F. 2d 863-4; *Davis v. School District of City of Pontiac, Inc., supra; Spangler v. Pasadena City Board of Education, supra,* 311 F. Supp. at 522-3.

9. The State and County Boards' refusal to consider racial criteria in adopting the plan of organization of administrative units pursuant to Act 150 constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from educational matters related to other criteria. *Lee v. Nyquist,* 402 U. S. 935 [1971] *aff'g.* 318 F. Supp. 710 [W. D. N. Y.] (three judge); *Hunter v. Erickson,* 393 U. S. 385 [1969]; *Bradley v. Milliken,* 433 F. 2d 897, 902-904 [6th Cir. 1970] and cases cited therein. Racial classifications are constitutionally suspect and will be upheld only if absolutely necessary to the accomplishment of a permissible state policy. *Hunter v. Erickson, supra; Loving v. Virginia,* 388 U. S. 1 [1967]; *McLaughlin v. Florida,* 379 U. S. 184 [1964].

10. A violation of the Fourteenth Amendments' prohibition against discrimination having been found, this Court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. *Brown v. Board of Education of Topeka,* 349 U. S. 294 [1955]; *Bradley v. Milliken, supra,* ____ F. 2d ____, slip opinion at 53; 345 F. Supp. at 937; *Kelly v. Altheimer Ark. Public School Dist. No. 22,* 378 F.2d 483, 489 [8th Cir. 1967].

11. On the basis of this Court's findings of unconstitutional school segregation, the present constitutional obligation of defendant school authorities is at the earliest possible time to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. *Swann v. Charlotte-Mecklenburg School Board of Education, supra; Green v. County School Board*, 391 U. S. 430 [1968]; *Bradley v. Milliken, supra*, 345 F. Supp. at 937 and cases cited therein.

12. The remedial obligation rests with school authorities; but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, this court has broad equity power, and the duty to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned, and implemented as soon as possible. *Swann v. Charlotte-Mecklenburg School Board of Education, supra; Carter v. West Feliciana School Bd.*, 396 U. S. 290 [1970], same 396 U. S. 226, 227-8 [1969]; *Bradley v. Milliken, supra*, 345 F. Supp. at 938; *Acree v. County Bd. of Education of Richmond Co., Ga.*, 458 F. 2d 486 [5th Cir. 1972]; *Pennsylvania Ass'n. Retard. Child. v. Commonwealth of Pa.*, 334 F. Supp. 1257, 1266 7 [E. D. Pa. 1971]; Fed. R. Civ. P. 52.

Courtroom No. 5, Sixth Floor, U. S. Post Office and Courthouse, Pittsburgh, Pennsylvania.

2. No party not a party to the present record will be heard at said hearing unless, on or before October 24, 1973, it files its Petition to Intervene and its Objections to the Commonwealth's Plan of School Desegregation for the Central Eastern Area of Allegheny County. Any proposed Intervenor shall file with its Petition and Objections a Pretrial Statement indicating the witnesses, testimony and other evidence it proposes to offer. No witness will be heard and no evidence will be received if not covered in the prior Pretrial Statement of the party offering such evidence.

3. Only School Districts directly affected by the Commonwealth's Plan will be permitted to intervene.

4. The hearing will be held to determine (1) whether the Plan submitted by the Commonwealth complies with the Order of this Court dated May 15, 1973; and (2) whether the Commonwealth abused its discretion in choosing the Plan it here submits for approval.

5. The Commonwealth shall furnish a copy of this Order to each affected School District together with a copy of the supporting rationale for its Plan.

SO ORDERED this 11th day of October, 1973.

GERALD J. WEBER,
United States District Judge.

cc: R. Stanton Wettick, Esq.,
Neighborhood Legal Services,
310 Plaza Bldg.,
Pittsburgh, Pa. 15219.

Burton Morris, Deputy Attorney General,
State Capitol Annex,
Harrisburg, Pa. 17120.

Alfred C. Maiello, Esq.,
304 Ross St.,
Pittsburgh, Pa. 15219.

Thomas M. Rutter, Jr., Esq.,
928 Frick Bldg.,
Pittsburgh, Pa. 15219.

Russell Evans, Chief,
Division of Distressed Districts,
Pennsylvania Dept. of Education,
Box 911, Harrisburg, Pa. 17120.

Notice of Motion to Intervene by Turtle Creek Area School District, Allegheny County

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,
Plaintiffs,

VS.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS, W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION.
Defendants.

Civil Action No. 71-538.

Please take notice that the undersigned will bring the motion of Turtle Creek Area School District, Allegheny County, for leave to intervene in this action for hearing before the United States District Court for the Western District of Pennsylvania as soon as counsel can be heard.

s/ JAMES C. EVANS,
Attorney for Turtle Creek Area School District.

Petition to Intervene as a Party in Interest

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Plaintiffs.

VS.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS, W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Defendants.

Civil Action No. 71-538.

To the Honorable, the Judges of Said Court:

The petition of Turtle Creek Area School District, on behalf of said school district and on behalf of its taxpayers, residents and school children, respectfully represent as follows:

Petition to Intervene as a Party in Interest.

1. That the Turtle Creek Area School District is a corporate body duly constituted by the laws of the Commonwealth of Pennsylvania and established as a school district of the third class.

2. That the said school district is entrusted with the duty and responsibility of providing education to those persons who constitute the students within the school system and such operation is on behalf of the taxpayers and residents of the district.

3. That on May 15, 1973, a final order by the Honorable Gerald J. Weber, Judge, United States District Court for the Western District of Pennsylvania, was made directing the defendants in the above-entitled case, to realign or redistrict school districts adjacent to and/or near-by contiguous to the General Braddock School District, to carry out the Court's order.

4. That said Turtle Creek Area School District is one of the adjacent school districts that may be affected by said order of court.

5. That on September 26, 1973 the State Board of Education adopted a plan of reorganization of administrative units affecting and involving Turtle Creek Area School District pursuant to the order of May 15, 1973 of His Honor, Judge Weber, District Court Judge, a copy of which plan was sent to the petitioner and included the petitioner.

6. That on October 11, 1973 Judge Weber entered an order fixing October 29, 1973 as the date for a hearing on said plan, a copy of such order being marked Exhibit A and attached hereto; said order severely restricting the petitioner as to their rights as a party upon being granted a permissive right to intervene.

Petition to Intervene as a Party in Interest.

7. That the petitioner believes that it has a right to intervene as a party in interest for the reasons that:

(a) The party defendants did not properly represent the interests of the petitioner, said representation being grossly inadequate in that no defense was presented and no facts were shown which motivated the Board of Education, the then County Board, and the Court of Common Pleas of Allegheny County, Pennsylvania, after numerous hearings as a result of which the petitioner was authorized and established as a new district. All of this information and facts were in the hands and under the control of the defendants even though not produced.

(b) The party-defendants had interests which were antagonistic to and conflicted with the interests of the petitioner as shown by the defendants' motion to join parties pursuant to Rule 21 and Rule 19. Even though the antagonistic interests were not disclosed in the motion of the defendants, General Braddock School District has been classed as a distressed school district and, thus, entitled to receipt of certain special funds from the State. In addition, an examination of the testimony will disclose that the State also had a divergent interest in that another agency of the State appeared in the form of an employee of such agency as a witness for the plaintiffs, all of which would indicate reasons why the party-defendants, namely the Commonwealth and the Pennsylvania Board of Education, believe themselves to have interests divergent to the petitioner.

(c) The party-defendants had interests which were antagonistic to and conflicted with the interests of the petitioner as set forth in (b), above, which interests motivated and gave cause to defendants to collude with and become a consenting party with the plaintiffs in the action, all to the detriment of the petitioner; such collusion being evident by the failure of the party-defendants and their refusal to show evidence which they had within their possession to show that the State Board of Education did act in a proper manner at the time of the establishment of the petitioner district as well as the facts and evidence produced in the Common Pleas Court concerning the establishment of the petitioner-district; and further, an examination of the record will disclose that they did nothing to counter the evidence produced by the plaintiffs, which evidence included testimony from members of another agency.

(d) The "interests" of petitioner is such an interest as is required under Rule 24 (a) (2) of the Federal Rules of Civil Procedure which once determined, demand the approval of the Court in permitting the petitioner to intervene. The District Court has wrongfully held that the interests of the petitioner in the controversy is not a "legally protectable interest" when denying the motion of the party-defendants in bringing in the petitioner on the record as an indispensable party. The only request made by the plaintiffs in the complaint was of an improper or unconstitutional application of a constitutional act of the Legislature of the State of Pennsylvania. To have

attacked the constitutionality of the act would have required presentation in front of a three-judge court. In addition, a reading of the complaint and the amended complaint, as well as the proceedings, would indicate that no attempt was made to claim or prove that any of the acts under which the various school districts were formed were unconstitutional. The only improper application of the statute as set forth in the complaint was the application in forming the school district No. 16 known as the General Braddock School District.

Under and by virtue of the laws of the State of Pennsylvania, the State Board of Education is not empowered, generally, to form any school districts. It is only by the authority granted to the State Board of Education by the Legislature that school districts can be formed through the affirmative act of the State Board of Education and with or without the consent of the school districts. Of the three acts which were passed by the Legislature giving authority to the State Board of Education or to its predecessor, the first act was repealed and the second and third acts do not empower the State Board of Education to now act because that authorization was exhausted by its use under the two acts.

There was no application by the plaintiffs in its complaint nor was there any suggestion during the controversy that the formation of any other adjacent school district was under attack and had to be reformed. In fact, even the act of the District Court in its order of May 15, 1973 did not suggest to the

the foregoing petition are true and correct, to the best of his knowledge, information and belief.

M. E. EVASHWICK.

Sworn to and subscribed before me
this 12th day of June, 1973.
Marjorie H. Belliotti,
Notary Public.
Pittsburgh, Allegheny County, Pa.
My Commission Expires July 19, 1976.

Order of Court

(Filed June 13, 1973.)

AND NOW, to-wit, this 13 day of June, 1973, the within Petition of Turtle Creek Area School District to Intervene as Party in Interest in the above-entiled case, and on motion of M. E. Evashwick, Esq., Solicitor for Turtle Creek Area School District, it is hereby ordered, directed and adjudged that the Petition of Turtle Creek Area School District to Intervene as Party in Interest, as an addtional defendant in the above-entitled case, be denied.

GERALD J. WEBER.

cc: R. Stanton Wettick, Esq.
Burton Morris, Deputy Attorney General
Thomas M. Rutter, Jr., Esq.
Russell Evans, Chief,
Division of Distressed Districts
M. E. Evashwick, Esq.

Petition to Intervene of Churchill Area School District, Allegheny County.

Notice of Motion to Intervene by Churchill Area School District, Allegheny County

(Filed June 13, 1973.)

Please take notice that the Undersigned will bring the motion of Churchill Area School District, Allegheny County for leave to intervene in this action for hearing before the United States Western District Court of Pennsylvania as soon as Counsel can be heard.

J. ROBERT MAXWELL, ESQ.,
CHURCHILL AREA SCHOOL DISTRICT,
ALLEGHENY COUNTY,
MAXWELL AND HUSS,
Attorneys for Intervenor,
301 Fifth Avenue Building,
Pittsburgh, Pa. 15222,
281-1658.

Petition to Intervene of Churchill Area School District, Allegheny County

(Filed June 13, 1973.)

Churchill Area School District moves for leave to intervene as a Defendant in this action, in order to appeal the Order of the United States District Judge, Gerald J. Weber, entered May 15, 1973. The granting of this motion is necessary prior to June 14, 1973 in order that an appeal may be taken before the time expires. The grounds for

appeal, among others, will be that findings of fact are based on the absence of or erroneous evidence, that the Judge refused to join necessary parties, and that the Judge lacked the power to order relief, and that the Judge erroneously concluded that there was a violation of the constitutional rights of the Plaintiffs and that the Judge did not and could not make the necessary findings to create the power to make the findings of constitutional violation.

It is necessary for your Petitioner to intervene and appeal at this time because neither the Commonwealth of Pennsylvania nor the State Board of Education nor the Attorney General of Pennsylvania nor the Allegheny Intermediate Unit nor any other party in the case, although some or part of them purport to represent your Petitioner, will appeal what is considered to be an erroneous decision of the Court.

J. ROBERT MAXWELL, ESQ.,
MAXWELL AND HUSS,
301 Fifth Avenue Building,
Pittsburgh, Pennsylvania 15222,
281-1658.

Order

Now, June 13, 1973. Petition denied.

GERALD J. WEBER,
District Judge.

cc: All counsel

Motion Requesting Court Approval of Defendants' Comprehensive Plan of School Desegregation for the Central Eastern Area of Allegheny County

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, *et al.*,

Plaintiffs,

VS.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants.

Civil Action No. 71-538.

---

1. On May 15, 1973, the Defendants herein were ordered, *inter alia*, to "prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation for the central eastern area of Allegheny County."

2. On July 9, 1973, the Commonwealth Defendants filed a Motion For Enlargement Of Time Necessary To Effect Compliance With May 15, 1973, Opinion And Order of This Court. Said Motion was granted on July 12, 1973.

3. The July 9, 1973 Motion, provided a timetable to be utilized in effecting the ordered compliance. This Court was notified at the completion of each step, as requested by this Court in its letter of July 17, 1973.

Motion Requesting Court Approval of Defendants' Comprehensive Plan of School Desegregation for the Central Eastern Area of Allegheny County.

4. In order to realize the objectives of this Court's Opinion and Order of May 15, 1973, the Commonwealth Defendants present the following Reorganization Plan to the Court for its approval.

Administrative Unit No. 1:

(a) Churchill Area School District
(b) Swissvale Area School District
(c) Edgewood School District
(d) Rankin Borough Schools
(e) Wilkinsburg School District

Administrative Unit No. 2:

(a) Braddock Borough Schools
(b) East Allegheny Area School District
(c) North Braddock Borough Schools
(d) Turtle Creek Area School District

5. The Commonwealth Defendants will issue and file in this Court, on or before October 10, 1973, a paper in support of their Reorganization Plan.

Respectfully submitted,

ISRAEL PACKEL,
Attorney General,
BURTON D. MORRIS,
Deputy Attorney General,
Attorneys for Commonwealth Defendants.

Pennsylvania Department of Justice,
Capitol Annex,
Harrisburg, Pennsylvania 17120,
(717) 787-1921.

Order Setting Hearing

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS, W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Defendants.

Civil Action No. 71-538.

Pursuant to a Conference of Counsel held on October 10, 1973, it is hereby ORDERED:

1. A hearing on the comprehensive plan of the Commonwealth of Pennsylvania filed in the above-captioned matter will be held beginning *Monday, October 29, 1973, at 10 a.m.,*

increased revenue will require changes by increased taxation and increased borrowing of money in order to do as directed by the State Board of Education, all of which changes in the interests will be done and forced without the petitioner having an adequate opportunity to protect these interests.

8. The defendants did not see fit to raise constitutional and jurisdictional questions to protect the interests of the Turtle Creek Area School District, and other school districts similarly situated.

9. The defendants in the above-entitled case seem to be unwilling or are not interested in pursuing the appeal of said case on jurisdictional and constitutional grounds to be a higher and final determination to protect and resolve the interests of the Turtle Creek Area School District, and other school districts similarly situated.

10. Turtle Creek Area School District feels that it, and other school districts similarly situated, would more seriously and fully protect the taxpayers, residents and school children of the Turtle Creek Area School District, and school districts similarly situated, by pursuing an appeal in the matter, as is being done in other state jurisdictions in similar cases.

11. Turtle Creek Area School District is of the opinion that it and other school districts similarly situated would conduct a fuller, better and stronger defense on behalf of the taxpayers, residents and school children of the Turtle Creek Area School District and school districts similarly situated, by being allowed to intervene and be a party-defendant in the above-entitled matter.

Petition to Intervene as a Party in Interest.

WHEREFORE, your petitioner respectfully petitions this Court that the Turtle Creek Area School District be allowed and permitted to intervene and become party-defendant in the above-entitled case, and to pursue the conduct of the case as the intervening party-defendant sees fit.

s/ JAMES C. EVANS,
Attorney for Turtle Creek Area School District.

Affidavit

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

BEFORE ME, the undersigned authority, personally appeared DONALD WUKICH, as President of the Board of School Directors of Turtle Creek Area School District, who after being duly sworn according to law, deposes and says the facts contained in the foregoing Petition are true and correct, to the best of his knowledge, information and belief.

s/ DONALD WUKICH.

Sworn to and subscribed before me
this 24th day of October, 1973.
Eileen Pierce,
Notary Public,
Pittsburgh, Allegheny County.
My Commission Expires May 28, 1976.
Member, Pennsylvania Association of Notaries.

Petition to Intervene as a Party in Interest.

Order of Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS, W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Defendants.

Civil Action No. 71-538.

AND NOW, to wit, this ____ day of October, 1973, the within motion of Turtle Creek Area School District to intervene as party in interest in the above-entitled case,

and on motion of M. E. Evashwick, Esq. and James C. Evans, Esq., attorneys for Turtle Creek Area School District, it is hereby ordered, directed and adjudged that the petition of Turtle Creek Area School District to intervene as party in interest, as an additional defendant and be permitted to file an answer to plaintiffs' amended complaint, raise all defenses permitted under the Federal Rules of Civil Procedure that are available to the petitioner, and be permitted to present evidence on all such issues raised by the pleadings.

.....

Exhibit A Attached to Petition to Intervene.

Exhibit A

Order Setting Hearing

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated,
Plaintiffs.

vs.

COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS, W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,
Defendants.

Civil Action No. 71-538.

Pursuant to a Conference of Counsel held on October 10, 1973, it is hereby ORDERED:

1. A hearing on the comprehensive plan of the Commonwealth of Pennsylvania filed in the above-captioned matter

will be held beginning Monday, October 29, 1973, at 10 a. m., Courtroom No. 5, Sixth Floor, U. S. Post Office and Courthouse, Pittsburgh, Pennsylvania.

2. No party not a party to the present record will be heard at said hearing unless, on or before October 24, 1973, it files its Petition to Intervene and its Objections to the Commonwealth's Plan of School Desegregation for the Central Eastern Area of Allegheny County. Any proposed Intervenor shall file with its Petition and Objections a Pretrial Statement indicating the witnesses, testimony and other evidence it proposes to offer. No witness will be heard and no evidence will be received if not covered in the prior Pretrial Statement of the party offering such evidence.

3. Only School Districts directly affected by the Commonwealth's Plan will be permitted to intervene.

4. The hearing will be held to determine (1) whether the Plan submitted by the Commonwealth complies with the Order of this Court dated May 15, 1973; and (2) whether the Commonwealth abused its discretion in choosing the Plan it here submits for approval.

5. The Commonwealth shall furnish a copy of this Order to each affected School District together with a copy of the supporting rationale for its Plan.

SO ORDERED this 11th day of October, 1973.

GERALD J. WEBER,
United States District Judge

Petition to Intervene Generally by Churchill Area School District, Allegheny County

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, *et al.*,
Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Defendants.

Civil Action No. 71-538.

1. Churchill Area School District moves for leave to intervene as a defendant in this action generally, and for all purposes, including proceedings *de novo*, to defend all phases of the case including the erroneous Findings of Fact in the Order of May 15, 1973 (many of which are based upon uncontradicted evidence arising out of essentially a non-adversary proceeding) and the unworkable, unauthorized and unresponsive plan of September 26, 1973, as well as the erroneous Conclusions of Law stated in the Order of May 15, 1973.

2. The Churchill Area School District is a school district voluntarily established under the Public School Code of 1949, March 19, P. L. 30, Article II, Sec. 251-253, as amended (24 P. S., 2-251, 253), per Exhibits A and B attached hereto. This voluntary establishment became effective July 1, 1962 pursuant to the Allegheny County Board

of School Directors' recommended plan for establishment of administrative units promulgated 1954-1957.

3. The Churchill Area School District was further declared to be an independent school district under the provisions of Act 561 of September 12, 1961, P. L. 1263 (24 P. S. 2-201, *et seq.*), and under the provisions of Act 299 of August 8, 1963, P. L. 564, (20 P. S. 2-290, *et seq.*), and under the provisions of Act 150 of July 8, 1963, P. L. (24 P. S. 2400, *et seq.*).

4. The Churchill Area School District now complies in all respects with the Public School Code and these mandatory acts aforesaid, and all of the laws and constitutions of Pennsylvania and of the United States. It operates a comprehensive educational progress meeting all of the standards promulgated thereunder.

5. On September 26, 1973 the State Board of Education adopted a plan of reorganization of administrative units affecting and involving Churchill Area School District.

6. Churchill is an independent school district properly established in 1962, and uneffected by any of the mandatory acts and not involved in any of the proceedings before the County Board, the State Board or the courts of Pennsylvania during the 1960's when the matters before Judge Weber in the above-captioned case were alleged to have occurred.

7. Churchill has a substantial interest in the education of its children and a substantial interest in the community of interest established by voluntary action in the late 1950's, and in the hard-won achievements of consolidation

State Board of Education that any other specific school district's boundary had to be changed in order to affect the correction of the situation involving the boundaries of the General Braddock School District. Thus, it becomes apparent that there was no direct attack established against the petitioner in the original pleadings and the procedures of the controversy up to and through the May 15, 1973 order involved in the litigation.

At the time of the May 15, 1973 order, the District Court did inform the State Board of Education that they were to change the boundaries of the General Braddock School District and any adjacent school district where "appropriate". At that time, the petitioner filed a petition to intervene under Rule 24 (a) (2) in the belief that this described them sufficient to require their intervention and their interest to be protected.

The District Court refused the petition of the petitioner and such refusal order has been appealed and is in front of the Third Circuit Court of Appeals at the present time.

The District Court, on October 11, 1973, did establish, by order, a hearing date on the plan as presented by the State Board of Education. In that order the Court established a date when a hearing on the plan could be held but restricted intervention to those school districts which were directly affected and, in addition, unduly restricted the matters to be heard in the hearing.

Petition to Intervene as a Party in Interest.

The "interests" of the petitioner in this controversy is such an interest as is required under Rule 24 (a) (2) of the Federal Rules of Civil Procedure. The District Court suggested that only a "legally protectable interest" was such an interest which would permit intervention under Rule 24 (a) (2). The Rule permitting intervention has been held to be broader under the new rules than under the old equity rule permitting intervention. See *Cascade Natural Gas Co. v. ElPaso Natural Gas Co.*, 87 S.Ct. 932, 386 U.S. 129, 17 L.Ed. (2d) 814 (1967).

Also, in the case of Nuesse v. Camp, (C.A. 1967) 385 F.(2d) 694, 128 U.S. App. D.C. 172, the Court rejected the suggestion that the interests required under Rule 24 was a specific "legal or equitable interest". In the case of *Nuesse* the Court allowed a state banking commission to intervene of a right in an action by a bank in that state seeking to enjoin the controller of currency from allowing a national bank to open a branch in the vicinity of the state bank. Also, in the case of Schmuck v. Hobson, (C.A. 1969) 408 F.(2d) 175, 132 U.S. App. D.C. 372, the Court allowed the school childrens' parents to intervene where the school board decided not to take an appeal. The interest being protected by such action being an interest in the freedom of the school board to exercise the broadest discretion constitutionally permissible in deciding upon educational policies, certainly, not a "legal or equitable" interest. The Court through Chief Judge Basilon stated in his opinion, ". . . The amendments made the question of what constitutes an 'inter-

est' more visible without contributing an answer. The phrasing of Rule 24 (a) (2), as amended, parallels that of Rule 19 (a) (2) concerning joinder. But the fact that two rules are entwined does not imply that an 'interest' for the purpose of one is precisely the same as for the other. The occasions upon which a petitioner should be allowed to intervene under Rule 24 are not necessarily limited to those situations when the Trial Court should compel him to become a party under Rule 19. And while the division of Rule 24 (a) and (b) into 'intervention of rights' and 'permissible intervention' might specifically suggest that only the latter involves an exercise of discretion by the Court, the contrary is clearly the case." p. 178.

An examination of the laws of the Commonwealth of Pennsylvania would also indicate that the State Board of Education does not have any authority to form districts other than that which has been given to it by the Legislature. As stated before, the Legislature did give certain authority to the State Board of Education, but this authority which was utilized by the State Board of Education in the establishment of the petitioner-district was subject to the appeal by the aggrieved districts which formed the new district and such appeal was to be heard by the Common Pleas Court of the County where the smaller districts were located which formed the larger district. The act itself made the action of the Common Pleas Court final in that the State Board of Education could not, again, review any of the determination. Of course, the aggrieved parties, if any there be, had their right to ap-

peal further to the Supreme Court of the State of Pennsylvania. It thus becomes apparent that the State Board of Education had no free hand in establishing school districts. In addition, the school districts, themselves, as constituted at the time, had a right to voluntarily merge with other school districts. In fact, this very voluntary act had occurred in the formation of Turtle Creek Union School District and, also, in the formation of other of the districts. It, therefore, becomes evident that the school districts themselves had control over their boundaries and could, in fact, voluntarily establish new boundaries. To even say that they had no "legally protectable interest" would be improper under these circumstances.

The District Court also stated in denying the petition of the defendants to make neighboring school districts such as the petitioner parties to the lawsuit under Rule 19 of the Federal Rules of Civil Procedure that the Commonwealth had control over the boundaries of the school district. It is admitted that the Legislature could create new legislation which would, again, force the change of the school boundaries of the petitioner, but it has not been done to date and there has been no attack on the law which was passed by the Legislature and under which the petitioner was formed. In addition, certain other school districts which are involved in accordance with the last order of the District Court as followed by the State Board of Education new plans, were formed under other acts not even mentioned in the litigation and these other acts were not claimed to be unconstitutional either. It

is the position of the petitioner that without the intervention of the various affected school districts, the District Court will have no authority to order the school districts to change their boundaries because the equitable powers of the Court cannot reach parties not parties of record. To say that the Legislature could pass a new act which would correct the situation involving the General Braddock School District without giving the Legislature an opportunity to so act is not within the power of the District Court even though they do have equitable powers to remedy an unconstitutional application of a constitutional act. As stated before, the State Board of Education presently has no law which authorizes it to do what the District Court is ordering it to do and that is beyond the equitable powers of the Court.

(e) It has been suggested that under Rule 24 (a) (2), the burden has shifted in favor of the intervenor and that the Courts allow intervention whenever there is a significant possibility that the representation may prove inadequate. (11 Wright and Miller, Federal Practice and Procedure, pg. 521-22) The then judge, Judge Blackmun, in the case of *Stadin v. Union Electric Co.*, C.A. 8th 1962, 309 F.(2d) 912, at 919, certiorari denied, 83 S.Ct. 1298, 373 U.S. 915, 10th L.Ed. (2d) 415 stated that inadequacy of representation is or may be shown, ". . . by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervenor, or by the failure of the representative in the fulfillment of his duties." It is

readily seen as set forth under points 7 (a), (b) and (c) as set forth, above, we have shown inadequate representation, admitted adverse interests, collusion between the parties who should represent the petitioner with the plaintiffs in the action all of which is evidenced by their failure to produce any defense whatsoever concerning the jurisdiction of the Federal Court as well as the arguments thereto, and arguments concerning the merits of the case of the plaintiffs, which defenses are being denied the petitioner unless a full and complete intervention is permitted. See *International Mortgage and Investment Corp. vs. Van-Klem*, C.A. (2d) 1962, 301 F.(2d) 857.

(f) The position of the Commonwealth in the action of appeal filed by the petitioner and other school districts in the State Court upon receipt of the plan produced by the State Board of Education would indicate that the Commonwealth is of the belief that they are not acting under any act and, therefore, there is no statutory appeal available to the petitioner and the other school districts. The limited opportunity presented by the District Court to intervene as a permissible intervention does not enable the petitioner to fully defend its interests and, therefore, the petitioner and its taxpayers may be forced to pay higher taxes, get involved in large scale transportation costs, and involve long periods of wasted time to its students and longer hours of school, as well as all of the usual and necessarily expensive administrative changes which will be required by the changes as evidenced by prior experience. In addition, the need for additional and

proval of administrative units adopted by the State Board of Education.

b. The State Board of Education abused its discretion in failing to take into consideration the factors of topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education.

c. The State Board of Education capriciously and arbitrarily denied the Churchill Area School District the right to introduce evidence of the undesirability of the adopted plan.

d. The plan adopted by the State Board of Education is not in accordance with law because it does not contain relevant and pertinent findings of fact.

e. The adopted plan by the State Board of Education is not in the best interest of the educational system of the Commonwealth of Pennsylvania, the County of Allegheny and the Eastern Central School Districts of Allegheny County and particularly the Churchill Area School District.

f. The State Board of Education capriciously and arbitrarily denied the Churchill Area School District the right to fully cross examine or otherwise question the facts and reasonings alleged in support of the proposed plan.

g. The State Board of Education capriciously and arbitrarily disregarded sound and convincing evidence that the Churchill Area School District should remain alone and not be joined in any further organization.

h. The State Board of Education capriciously and arbitrarily disregarded the sound and convincing evidence previously accepted as sound and convincing by the Allegheny County School Board and by the State Board of Education on four separate occasions, to-wit:

(1) In 1962 under the voluntary provisions of the Public School Code; see Exhibits A and B hereto.

(2) In 1963 under the provisions of Act 561.

(3) In 1964 under the provisions of Act 299.

(4) In 1965 under the provisions of Act 150.

At all relevant times to date Churchill Area School District met all of the requirements and standards promulgated pursuant to the aforementioned laws.

i. The Churchill Area School District will be irreparably harmed if it is required to enter another reorganization, having been just reorganized by the State Board of Education as aforesaid, said reorganization having been effective since July 1, 1962.

j. The State Board of Education subsequent to the reorganization of the Churchill Area School District has deprived the Churchill Area School Dis-

trict of due process and equal protection of the law, and it has been deprived of its rights under Act 150 of 1965 (24 P. S. 2400.1-2400.10) generally, and particularly under Sec. 5 of the Act (24 P. S., 2400.5). Moreover, it has been deprived of its rights under Act 299 and under Sec. 295 of the Public School Code of 1949.

k. The State Board of Education erred in including the Churchill Area School District in the plan of September 26, 1973 because Churchill Area School District was never involved in any reorganization hearings before the Allegheny County Board or before the State Board of Education, or in the courts, on the contrary, Churchill Area School District was always apart from the mandatory establishment proceedings and from any alleged impropriety that may have developed during those proceedings; Churchill Area School District boundary lines are, and were at all times, rationally related to legitimate purpose and promoted valid state interests pursuant to constitutional and legislative purpose.

l. The plan of September 26, 1973 of the State Board of Education is irrational, unlikely to be acceptable to the public and is so revolutionary in character as to require the consent of the electorate; this solution to the problem of another school district is offered without consulation, agreement or discussion with duly elected representatives of Churchill Area School District, which offering is beyond the authority of the State Board and is the antithesis of representa-

tive government, the plan is irrational in ignoring a longstanding community of interest out of which has developed a sound educational program, for the purpose of solving socio-economic problems of an adjacent community—a purpose unrelated to the interests of the community and pupils in Churchill Area School District, and unrelated to the authority of the State Board of Education which is limited to educational affairs; see attached Exhibit C, the unanimous resolution and public statement of the Board of School Directors of Churchill Area School District dated October 8, 1973.

m. The State Board of Education has deprived the Churchill Area School District of due process and equal protection of the law in that, having been established under Act 299 and Act 561 and voluntarily under the Public School Code prior to July 1962, the State Board had no right in law to act under Act 150 or under any other lawful authority with respect to Churchill Area School District because of the legislative limits upon its power under Sec. 1 and Sec. 2a and Sec. 2b of Act 150, whereby the Legislature prohibited the State Board of Education from acting with respect to any school district established, with all appeals, final, under Act 299 unless and until such school district consented to have its boundaries changed.

n. The plan is improperly submitted while the various statutory appeals in the Court of Common Pleas of Allegheny County are pending (Edgewood at S. A.

531 of 1973 and Churchill at S. A. 545 of 1973, *inter alia*.)

o. The State Board had earlier exhausted its authority to act in the premises.

p. The State Board has not made available data on which the plan is based, and has not indicated the plan's effect upon pupils, curriculum, costs, community, people and their attitudes, governance and other factors that should have been considered in the promulgation of a plan.

q. The plan itself was developed in accordance with a procedure that violates due process of law. The rationale for the plan is called a statement of September 20, 1973 but is dated at the end October 14, 1973, was apparently submitted to the court on October 11, 1973 as supportive of a plan decided by an 8/3 vote which was presented to the court on September 26, 1973. It is a plan that was suggested by the Wilkinsburg School District to the State Board, apparently for the first time on September 10, 1973, which leaves considerable question as to how much supporting data for the plan is available even now; moreover, it was suggested by a district not envisioned as a part of the affected community by this court; moreover, it is reported that the Wilkinsburg School Board and staff have rejected the plan.

r. The State Board has no power to set an operation date of July 1, 1974, as it purports to do on page 1 of the rationale. Similarly, Sections 2, 26 and 303.1

of the Public School Code do not give the State Board the authority to effectuate the plan as directed on pages 13 and 14 of the rationale.

s. The rationale suggests that subcommittees visited the area, held conferences and reviewed correspondence, but the results of that work and the hearings purportedly conducted have not been subjected to inspection or cross-examination.

t. School districts were not "heard" and were not permitted "to respond" at the State Board hearings or at any other purported conferences, in the accepted methods by which due process of law is provided to those whose rights may be affected. There was no opportunity to confront witnesses or use discovery, to develop data, or to present proposed findings of fact or law, nor was adequate time provided for deliberation by the State Board.

u. The State Board had no statutory authority to subject the various proposals to Human Relations Commission's criteria, or to joint statements on integration, or to a judgment that no school district have more than a 30% black enrollment. These standards found on page 3 of the rationale, are not now available to counsel and were not presented at the hearings for deliberation, cross-examination, contradictory evidence and conflicting opinions that may exist in educational circles outside of the Department of Education, the Human Relations Commission and the State Board.

v. The State Board applies other standards throughout the statement of September 20, 1973 which have the effect of trading what is known to be good for what is unknown. They are rationale stating limited factual characteristics about the proposed new districts without data showing the effect on education, cost, community of interest, people, students and governance. The main supportive rationale is on page 6, allowing for practical plans of desegregation, the State Board has no authority to embark upon plans of desegregation. The court has no such authority without proper constitutional findings. The rationale for this plan clearly anticipates busing which is beyond the power of the State Board and beyond the power of the district court without prior findings of a dual school system.

w. The statement of September 20, 1973 on page 8, and elsewhere, applies standards to the proposed districts which are legal standards and which were applied to Churchill in 1962 during voluntary establishment; these standards were also applied to Churchill under Act 561 and Act 299, under both of which Churchill was deemed established *pro forma*, without being involved in any of the proceedings under those acts.

Respectfully submitted,

J. ROBERT MAXWELL, ESQ.,
Lawyer for Churchill Area School District,
1301 301 Fifth Avenue Building,
Pittsburgh, Pennsylvania 15222.
(412) 281-1650.

Memorandum Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS, *et al.*,
Plaintiffs.

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Defendants.

Civil Action No. 71-538.

Pursuant to a hearing held on October 29, 1973, it is ORDERED that:

1. The motions of all proposed intervenors to intervene generally in the proceedings are DENIED, to wit:

Churchill Area School District
East Allegheny School District
Edgewood School District
Swissvale Area School District
Turtle Creek Area School District.

2. The motions of all proposed intervenors to intervene in the proceedings for the purpose of determining (a) whether the Commonwealth Plan complies with the court's order of May 15, 1973, and (b) whether the Commonwealth abused its discretion in choosing the plan it has submitted for approval are GRANTED, to wit:

during the years since 1962. Nevertheless, Churchill has been named by the plan of September 26, 1973 as a part of a new district and its substantial interest is, therefore, directly and materially affected.

8. The aforesaid substantial interest, among others, is a proper interest under the law and the denial of the right to protect that interest is irreparably harmful to Churchill. This court has already once, in June 1973, denied Churchill's right to intervene for the purpose of appeal and that denial is on appeal in the Court of Appeals for the Third Circuit at No. 73-1784, Churchill's right to protect its proper interests from substantial harm should not be twice denied.

9. Churchill's proper interests have not been heretofore adequately represented in the District Court so that the Order of May 15, 1973 with its Findings of Fact and Conclusions of Law is founded upon uncontradicted testimony which could have been and should have been contradicted, and upon erroneous Conclusions of Law, the error of which was not at all or not adequately pointed out to the court. The record shows that the Intermediate Unit took the position that it had no statutory authority to act in any way with respect to the case and, therefore, could not defend. The Commonwealth and the State Board and the Attorney General took the position that they had conflicting interests and the Attorney General did not, in fact, vigorously defend. The record consists of uncontradicted testimony and stipulations selected by plaintiff, and affidavits and other testimony not subjected to cross examination, and expert testimony on subjects where it is well known that

there are many divergent views. The proceeding was non-adversary because in spite of more than one motion directed toward a fatal characteristic of the proceedings, the court refused to join Churchill and others as indispensable parties.

10. There are other fundamental questions of fact which have not been considered as yet by the court, such as those mentioned in the Pre-Trial Statement of Churchill, concurrently submitted. There are numerous fundamental questions of law which have either not been addressed or have been erroneously decided which affect the educational and constitutional rights of Churchill and its citizens. In addition to the court's failure to join indispensable parties, it is contended that the court lacked the power to order relief even assuming that the erroneous Findings of Fact were correct, moreover, the court erroneously concluded that there was a violation of the constitutional rights of the plaintiffs, and the court did not and could not make the necessary findings to create the power to make such findings of constitutional violation of plaintiffs' constitutional rights. Other legal arguments that should be addressed are:

(a) Supreme Court has never followed *per se* doctrine in school integration cases, *e.g., de facto* segregation is unconstitutional.

(b) Black parents must also have a choice. Constitutional rights must not be converted into constitutional duties.

(c) Education is a *state* function with all the implication of segregation of powers. See opening paragraph in *Bradley v. Richmond*, Fourth Circuit.

(d) There is no language in the Constitution about "viable racial mix", "maximum integration", "tipping points", "racial quotas" or "quality education". The only relevant portions of the Constitution are the Fourteenth Amendment (Equal Protection) and the Tenth Amendment (Separation of Powers).

(e) The court Order is in violation of the state guidelines, *e.g.*, introduces *race* as a factor and converts school district reorganization into school integration legislation.

(f) This court does not have jurisdiction over a reorganization plan of the State Board nor over realignment of school district, nor ever basing or other means of integrating school districts. That power resides with the state legislature and the state courts, at least in the absence of a finding that there existed in Churchill and/or elsewhere a dual school system and invidious discrimination in Churchill.

(g) This court cannot adopt a plan which the State Board has no statutory authority to prepare, the State Board's power under the mandatory acts had not been exhausted.

(h) The Constitution does not forbid an all-Black or an all-Indian or an all-Chinese school district. The Supreme Court has never said that there is a constitutional right to a racially balanced education, in fact, one of the justices has been reported in the news as saying recently that the Supreme Court has held that there is nothing at all in the Constitution requiring racial balance. Moreover, the court has held recently in *San Antonio v. Rodriques* that

education is not a fundamental right under the Constitution, and that the federal judiciary system cannot be used to compel a state to offer the best possible education or any quality of education. The latest pronouncement is in the *Richmond* case stating that a district judge is without authority to compel a state to restructure governmental units to achieve racial balance in the schools.

(i) What area limitations are there upon the district judge's power (in cases where proper findings can be made), when plaintiffs bring an action in one community? In this case the court mentioned several school districts and the State Board extended that area to include seven additional school districts, two of which it eventually included within the plan of September 26, 1973.

11. The plan of September 26, 1973 is inappropriate and unsupported, and the work of the State Board in developing the plan violated the constitutional rights of Churchill. It is necessary that Churchill be permitted intervention for all purposes and *de novo* proceedings scheduled in order that the rights to substantive and procedural due processes that were denied before the State Board may be provided in this court with respect to the plan, the date if any supporting it, and the power of the State Board to promulgate it.

Respectfully submitted,

J. ROBERT MAXWELL,
Lawyer for Churchill Area School District.
1301 301 Fifth Avenue Building,
Pittsburgh, Pennsylvania 15232,
(412) 281-1658.

Petition to Intervene Specially per Order of October 11, 1973 with Objections to State Board Plan of September 26, 1973

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, *et al.*,

Plaintiffs,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants.

Civil Action No. 71-538.

If Churchill Area School District's Petition for leave to Intervene Generally, filed concurrently, is denied, then Churchill, without waiving its rights to proceed otherwise with respect to that Petition to Intervene, does hereby intervene pursuant to the Order of this court of October 11, 1973, under protest, and submits its objections to the State Board's plan of September 26, 1973. A Pre-Trial Statement indicating witnesses, testimony and evidence, insofar as that can be planned in such a limited time, is also attached.

Churchill objects to the State Board's plan of September 26, 1973 for the following reasons:

1. The Churchill Area School District is a school district voluntarily established under the Public School Code

of 1949, March 10, P. L. 30, Article II, Sec. 251-253, as amended, (24 P. S., 2-251, 253), per Exhibits A and B attached hereto. This voluntary establishment became effective July 1, 1962 pursuant to the Allegheny County Board of School Directors' recommended plan for establishment of administrative units promulgated 1954-1957.

2. The Churchill Area School District was further declared to be an independent school district under the provisions of Act 561 of September 12, 1961, P. L. 1283 (24 P. S. 2-241, *et seq.*), and under the provisions of Act 299 of August 8, 1963, P. L. 564, (24 P. S. 2-290, *et seq.*), and under the provisions of Act 150 of July 8, 1963, P. L. (24 P. L. 2480, *et seq.*).

3. The Churchill Area School District now complies in all respects with the Public School Code and these mandatory acts aforesaid, and all of the laws and constitutions of Pennsylvania and of the United States. It operates a comprehensive educational program meeting all of the standards promulgated thereunder.

4. On September 26, 1973 the State Board of Education adopted a plan of reorganization of administrative units affecting and involving Churchill Area School District.

5. The plan is arbitrary, capricious and an abuse of the discretion of the State Board and beyond its statutory authority for the following, among other, reasons:

a. The State Board of Education has failed to apply the standards and criteria provided by Act 150 of 1968 (24 P. S., 2400.1-2400.10) and Act 299 of 1963 (28 P. S., 2-290, *et seq.*), and the standards for ap-

Churchill Area School District
East Allegheny School District
Swissvale Area School District
School District of the Borough of Wilkinsburg.

3. All proposed intervenors have leave of the court to consult together and with the named parties in an attempt to reach agreement, partial or total, as to an acceptable plan which will meet the objective of the court's order of May 15, 1973, the elimination of the racial segregation created and maintained by the establishment of the General Braddock Area School District. Because the Commonwealth of Pennsylvania is the only party empowered to effect such a solution the plan must be presented by the Commonwealth.

4. Any such alternative plan shall be filed with the Court on or before November 19, 1973.

5. A hearing will be held on the approval of the Commonwealth's plan now presented, or any amended or alternative plan submitted on *Monday, November 26, 1973, beginning at 10 a. m.* to determine,

(1) Whether the Commonwealth's plan complies with the court order of May 15, 1973, and

(2) Whether the Commonwealth abused its discretion in choosing the plan it has submitted for approval.

6. On or before November 22, 1973, all parties which have been granted leave to intervene shall file and serve any amended pretrial statements in form sufficient to constitute an offer of proof as to such evidence as it wishes to present at such hearing.

SO ORDERED this 6th day of November, 1973

GERALD J. WEBER,
United States District Judge.

Constitutional Provisions

United States Constitution, Amendment V provides:

> AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963, Art. 8, § 2 provides:

> Free public elementary and secondary schools; discrimination.
>
> SEC. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

United States Statutes

Judicial Code, 28 U. S. C. § 1254(1) provides:

> 1254. Courts of appeals; certiorari; appeal, certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Judicial Code, 28 U. S. C. § 1292(b) provides:

§ 32. Certain Local and Special Laws

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:

2. Vacating roads, town plats, streets or alleys:

3. Locating or changing county seats, erecting new counties or changing county lines:

4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:

5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:

6. Exempting property from taxation:

7. Regulating labor, trade, mining or manufacturing:

8. Creating corporations, or amending, renewing or extending the charters thereof:

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed. (Amended and renumbered May 16, 1967).

§ 2—201. How constituted

All school districts shall remain as now constituted until changed as authorized by this act. Except as otherwise now or hereafter constituted, each city, incorporated town, borough, or township in this Commonwealth, now existing or hereafter created, shall constitute a separate school district, to be designated and known as the "School District of .....:"

§ 2—211. General powers of districts

The several school districts in this Commonwealth shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act.[1] 1949, March 10, P. L. 30, art. II, § 211.

§ 2—242.1 Establishment of independent districts for transfer of territory to another school district

(a) A majority of the taxable inhabitants of any contigous territory in any school district or school districts, as herein established, may present their petition to the court of common pleas of the county in which each contiguous territory, or a greater part thereof, is situated, asking that the territory be established as an independent district for the sole purpose of transfer to an adjacent school district contiguous thereto. Where the territory described in any such petition is to be taken from two or more school districts, such petition shall be signed by a majority of all the taxable inhabitants of the part of each

school district which is to be included in such independent district for transfer. Such petitions shall set forth a proper description of the boundaries of the territory to be included in such proposed independent district, and the reasons of the petitioners for requesting such transfer to another school district and the name of the district into which its territory is proposed to be placed.

The court shall hold hearing thereon, of which hearing the school district or districts out of whose territory such proposed independent district is to be taken and the school district into which the territory is proposed to be assigned, shall each have ten days notice. In all cases where an independent district is proposed for transfer from one school district to another, the merits of the petition for its creation, from an educational standpoint, shall be passed upon by the Superintendent of Public Instruction and the petition shall not be granted by the court unless approved by him. The court of common pleas shall secure the reaction from the Superintendent of Public Instruction upon receipt of the petition properly filed.

The court, in its decree establishing such independent district for transfer purposes, shall also determine the amount, if any, of the indebtedness and obligations of the school district, from whose territory such independent district is taken, that said district shall assume and pay, and, a statement prorating the State subsidies payable between or among the losing district or districts and the receiving district.

In all cases where such proceedings result in the creation and transfer, by decree of the court, of an independent district, the cost and office fees shall be paid by the

petitioners or, otherwise, by the receiving district. Such independent districts created under the provisions of this act shall not become an operating school district but will be created for transfer of territory only.

(b) In the case of independent districts established hereafter, the court of common pleas shall notify the county board of school directors regarding receipt of petition for such establishment and shall direct said board to prepare a statement of acceptance or rejection of the proposed placement of the district in the designated administrative unit of the county plan; such statement to be transmitted to the court and to the State Board of Education.

1949, March 10, P. L. 30, art. II, § 242.1, added 1965, June 23, P. L. 139, § 1, as amended 1967, Dec. 19, P. L. 865, § 1.

Library references Schools and School Districts 37(5) *et seq.*

C. J. S. Schools and School Districts §§ 39, 43-45.

P. L. E. Schools § 16 *et seq.*

Pennsylvania Special Act of 1968

SUPPLEMENT TO SCHOOL CODE—ADMINISTRATIVE UNITS [NEW]

§ 2400.1 Standards for organization of administrative units

The State Board of Education, within thirty (30) days of the effective date of this act, shall adopt standards for approval of administrative units comprised of those school districts which are not in an administrative unit established as a school district under section 296 of the act of March 10, 1949 (P. L. 30), as amended,[1] taking into account the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education.

1968, July 8, P. L. 299, No. 150, § 1.

[1] Section 2-296 of this title.

RULE 12

PLEADINGS AND MOTIONS

* * *

opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary Hearings.* The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of Defenses in Motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) *Waiver or Preservation of Certain Defenses.*

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

1963 Amendment

Substituted, at the end of the first sentence of subdivision (a), the provision "except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state" in lieu of the provision "unless the court directs otherwise when service of process is made pursuant to Rule 4(e)."

1966 Amendment

Provided that a defense of "(7) failure to join a party under Rule 19" rather than "(7) failure to join an indispensable party" may be made by motion; substituted the second sentence of subdivision (g) in lieu of a sentence reading, "If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule"; and substituted a new subdivsion (h) in lieu of former subdivision (h) which read: "(h) *Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permited, or by motion for judgment

on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

RULE 19

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk if incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

RULE 23.2

ACTIONS RELATING TO UNINCORPORATED ASSOCIATIONS

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Added Feb. 28, 1966, eff. July 1, 1966.

RULE 24.

INTERVENTION

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1)

when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., § 2403" at the end of subdivision (c) for the reference to "the Act of August 24, 1937, c. 754, § 1."

1963 Amendment

Substituted the words "upon the parties as provided in Rule 5" in lieu of the words "upon all parties affected thereby," at the end of the first sentence of subdivision (c).

1966 Amendment

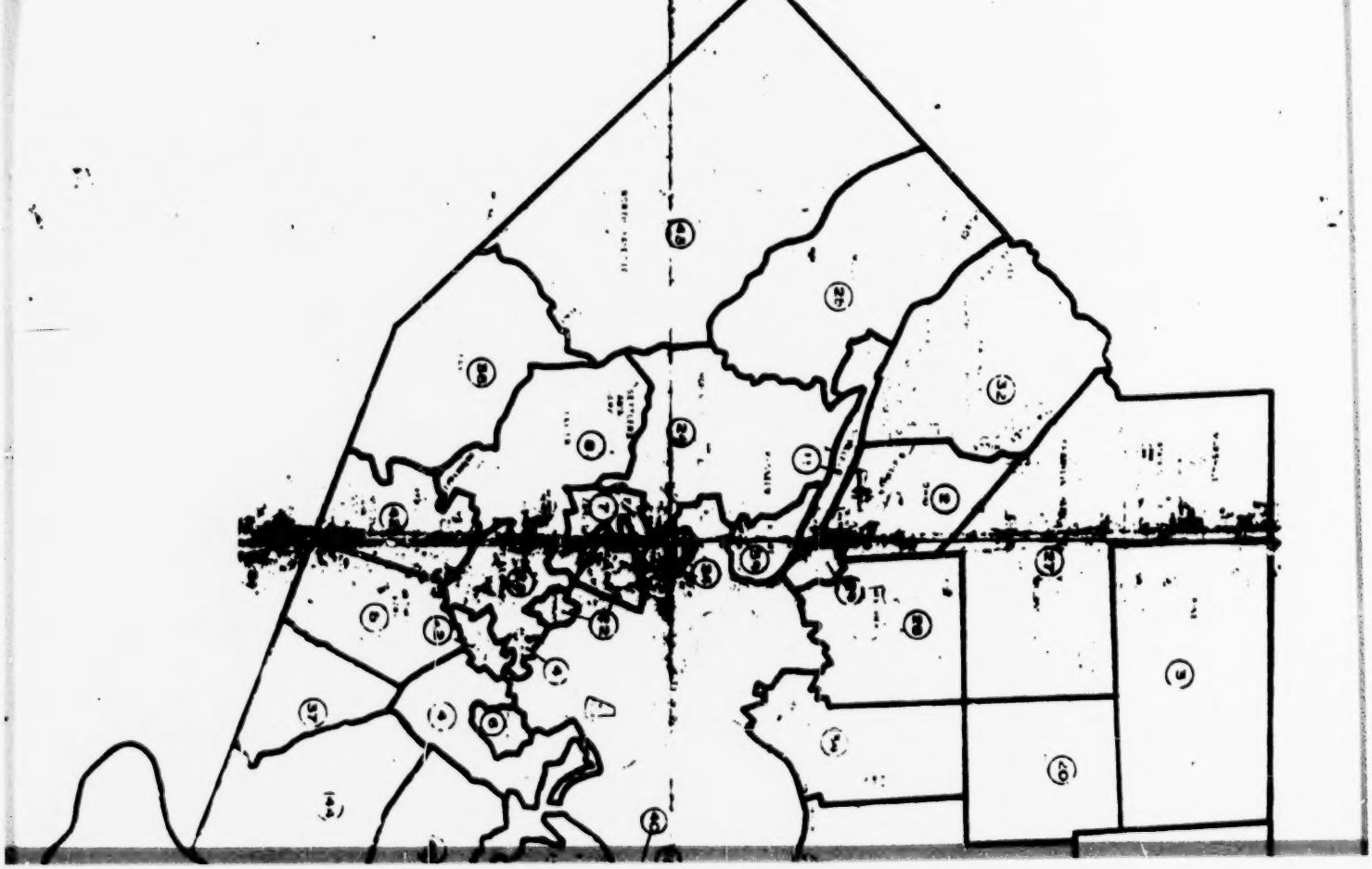
Substituted, in subdivision (a), clause (2) in lieu of clauses (2) and (3) reading, "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

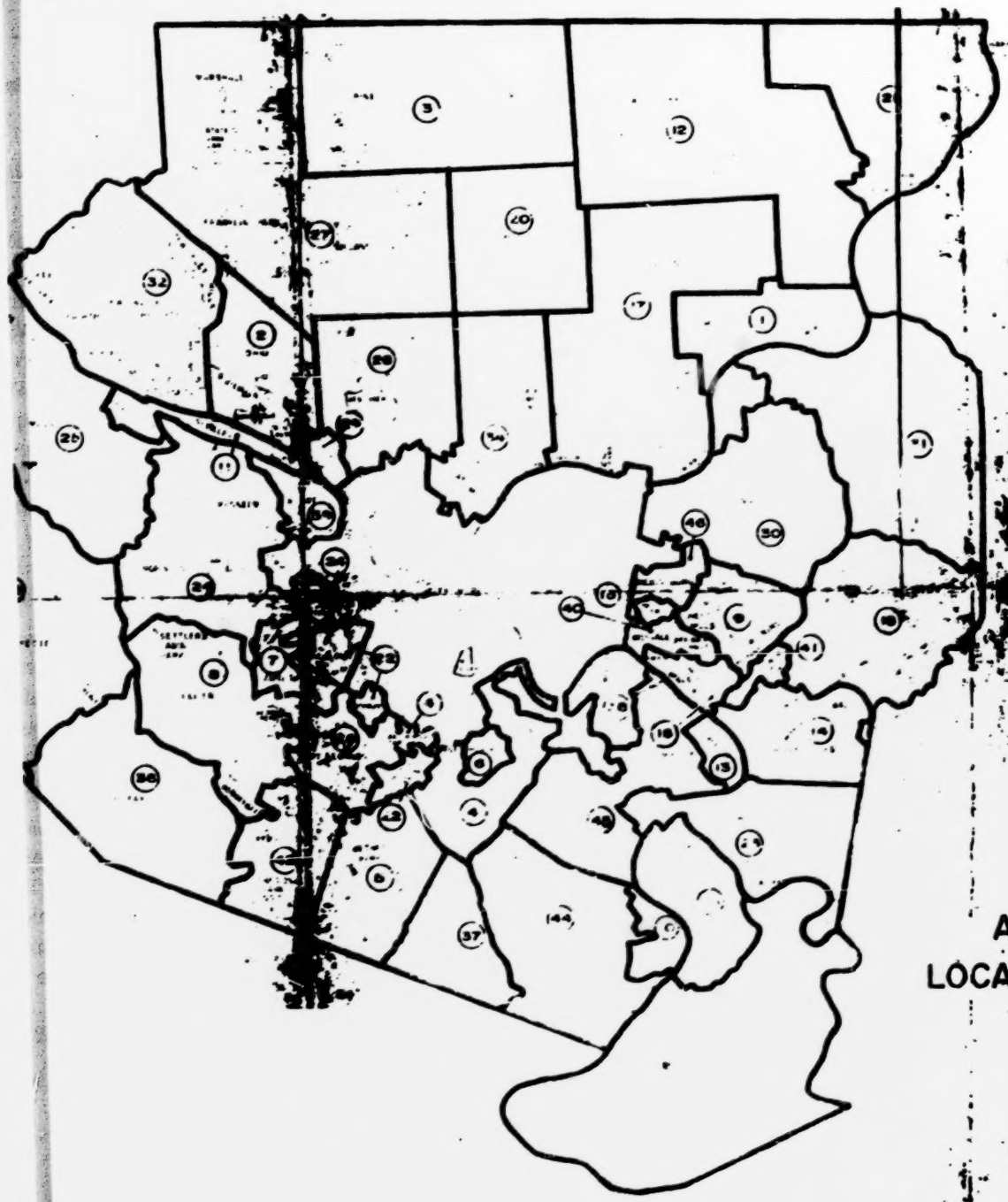
RULE 25.

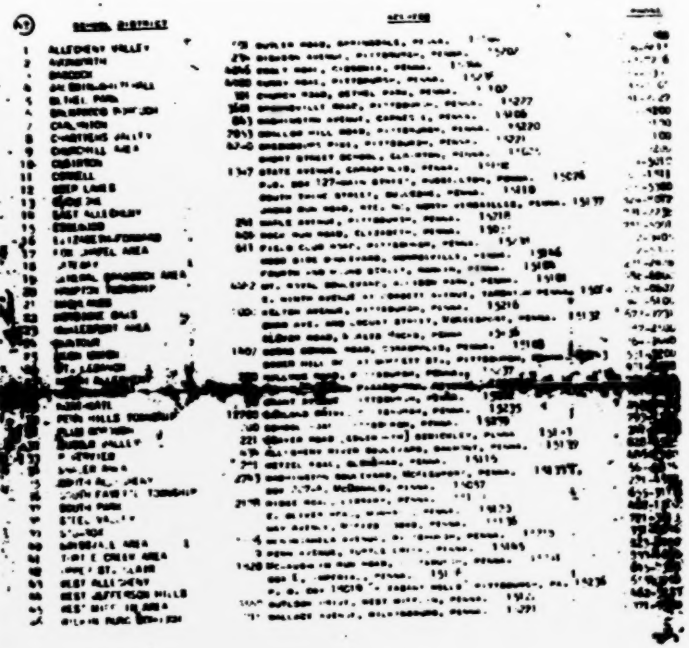
SUBSTITUTION OF PARTIES

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon * * *







ALLEGHENY COUNTY
LOCAL SCHOOL DISTRICTS

, V – 1971

ALLEGHENY COUNTY,
PENNSYLVANIA

Order of District Court of December 8, 1971

• • •

4. The complaint fails to name necessary parties-defendants.

Defendants aver that the complaint fails to join as necessary parties either the adjoining school districts created by the reorganization plan, which might be affected by any relief granted, or the General Braddock Area School District which is the reorganized entity of which plaintiffs complain. Plaintiffs reply that these school districts have no rights in or property interest in their existing boundaries. They were created without their own assent, and they may be altered similarly. While these districts might intervene in this action under Fed. R. of Civ. P. 24 if they so desire, the court does not find their absence from this action as a practical matter impairs their ability to protect such interest as they have.

The court takes note from the pleadings that prior state court proceedings were instituted by the individual school boards involved in this reorganization in which they raised objections which were dismissed in the state courts. The constitutional issues now raised were not raised in those state court proceedings.

We have considered all of the objections raised and find none of them sufficient to require dismissal of this complaint. The general rule applicable to all of such objections is that a complaint should not be dismissed unless it appears to a certainty that plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim. *Frederick Hart & Co. Inc. v. Recordgraph Corp.*, 169 F. 2d 580 [3rd Cir., 1953].

Order of District Court of December 8, 1971.

Order

AND NOW, December 8, 1971, upon oral argument and consideration of briefs it is ORDERED that all Motions to Dismiss of all Defendants filed in this action are hereby DENIED.

GERALD J. WEBER,
United States District Judge.

cc: R. Stanton Wettick, Jr., Esq.,
Neighborhood Legal Services,
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413 Finance Bldg.,
Harrisburg, Pa. 17120.

Defendant's Motion to Join Parties Pursuant to Rule 21

(Filed December 1, 1972.)

Defendant Commonwealth of Pennsylvania, pursuant to Rule 21 of the Federal Rules of Civil Procedure, hereby moves this Court for an Order making the boards of school directors of the area school districts of Churchill, Edgewood, General Braddock, Swissvale and Turtle Creek; additional party defendants herein; directing that process be issued and served upon said parties; and requiring plaintiffs to serve and file an amended complaint, and for grounds therefore aver:

1. This is an action for declaratory and injunctive relief, for alleged deprivation under the color of state law, of rights, privileges and immunities guaranteed to plaintiffs by the Constitution and the laws of the United States.

2. The above-listed area school district boards are certain to be inextricably bound up in any action to be ordered by this Honorable Court.

3. The above-listed area school district boards are representative of the various interests involved herein.

4. This case presents conflicting interests in a most involved and intricate set of issues. No relief or other measures can be justly, realistically or efficaciously shaped and ordered without the participation of these area school district boards. Their joinder and participation are necessary so that a proper and complete adjudication can be rendered and justice can be done in accord with Rule 19 of the Federal R. C. P.

5. The above-mentioned area school district boards, are subject to the jurisdiction of this Court as to service of

process and can be made party defendants herein without depriving this Court of jurisdiction.

Respectfully submitted,

BURTON D. MORRIS,
Deputy Attorney General,

J. SHANE CREAMER,
Attorney General,

Attorneys for Defendants.

Order to Join Defendants Pursuant to Rule 21

This cause came to be heard on motion of the defendant Commonwealth of Pennsylvania, making the boards of school directors of the area school districts of Churchill, Edgewood, General Braddock, Swissvale and Turtle Creek; additional party defendants herein, and it appearing to the Court that said parties whose presence is needed for a just adjudication as provided by Rule 19 of the Federal Rules of Civil Procedure, that the above-listed parties can be served with process, and that their joinder will not deprive this Court of jurisdiction.

IT IS ORDERED:

(1) That the above-named school district boards be made party defendants to this action; and that the caption of this action shall be amended accordingly;

(2) That plaintiffs serve and file an amended Complaint within ____ days after entry of this Order; and

(3) That a copy of said amended complaint, together with a copy of Summons and a copy of this Order be served upon the above-listed parties within ____ days after entry of this Order.

....., *United States District Judge.*

Dated: ....., 1972.

Defendant's Motion to the District Court Judge for Certification Pursuant to Title 28 United States Code § 1292(b)

Defendant Commonwealth of Pennsylvania pursuant to Title 28 United States Code § 1292(b), hereby moves this Court for Certification that its Order of this day denying Defendant's Motion for the Joinder of Parties pursuant to Rule 21 involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from the Order of this Court may materially advance the ultimate termination of the litigation.

Respectfully submitted,

BURTON D. MORRIS,
Deputy Attorney General,

J. SHANE CREAMER,
Attorney General,

Attorneys for Defendant.

Order of Certification by District Court Judge Pursuant to Title 28 United States Code § 1292(b)

I certify that the issue disposed of this day in my denial of the Motion for the Joinder of Parties pursuant to Rule 21 of the Federal Rules of Civil Procedure as filed by the defendants, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

....,
United States District Judge.

Dated: ....., 1972.

Certification of Service

On this 1st day of December, 1972, I, Burton D. Morris, Esq., Deputy Attorney General of the Commonwealth of Pennsylvania, hereby certify that I this day served the within Motion to Join Parties, Motion for Certification and companion orders, by depositing copies of the same in the United States Mail, postage prepaid, at Pittsburgh, Pennsylvania, return receipt requested, addressed to:

R. Stanton Wettick, Jr., Esq.
Neighborhood Legal Services Association
310 Plaza Building,
Pittsburgh, Pa. 15219

Thomas M. Rutter, Jr., Esq.
928 Frick Building,
Pittsburgh, Pa. 15219

Russell Evans, Chief
Division of Distressed Districts
Pennsylvania Department of Education
Box 911
Harrisburg, Pa. 17120

Board of School Directors
Churchill Area School District
4240 Greensburg Pike
Pittsburgh, Pa.

Board of School Directors
Edgewood Borough School District
241 Maple Avenue
Pittsburgh, Pa.

Board of School Directors
General Braddock School District
Jones Avenue
North Braddock, Pa.

Board of School Directors
Swissvale Area Joint School District
1800 Monongahela Avenue
Pittsburgh, Pa.

Board of School Directors
Turtle Creek School District
519 Penn Avenue
Turtle Creek, Pa.

BURTON D. MORRIS,
Deputy Attorney General.

The Court: Well, the interest of the Court, the on-going interest, is to see that whatever decree is entered shall be carried out.

Mr. Morris: Yes. This is correct, and immediately, at that point in time, the interest of all of the other school districts comes very much to the forefront.

The Court: You have done, in your office—your predecessors have done everything to notify the other districts of the pendency of this action. This was done repeatedly. This question has been brought up time and again. The Court has not found it necessary. We have said permissive joinder is another matter, but no one has sought permissive joinder, and the plaintiff is willing to risk his suit on non-joinder. The only question—we have considered this, of course, time and again. I recognize the value and effort of the Commonwealth, because the Commonwealth has been the party that has borne the entire burden, let's say, of the preparation of the defense of this lawsuit. We recognize that.

There is also a motion for certification of a controlling question of law. You have urged and urged strongly that we have a controlling question which an immediate appeal may materially advance, and, of course, we are reluctant because we know appellate courts are reluctant to decide half a lawsuit, and we are reluctant, therefore, to determine this. Is there anything further on that? We get that and, of course, we delay these proceedings again for a considerable period of time.

Mr. Morris: If we go to the circuit.

The Court: The argument which you are making about the necessity of these parties being present, this time, to protect their interests is one that I have been conscious of, but they haven't wished to be present, and the plaintiff does not care to make them parties.

Is there anything further, Mr. Wettick?

Mr. Wettick: No, your Honor. I think that it is our position, since it was the Commonwealth that put this school district together, it is the Commonwealth that the order can be directed against.

The Court: We start with the premise that education in the Commonwealth of Pennsylvania is a function of the Commonwealth, and how they do it is their business, and, therefore, our only concern is have they done something in this instance—regardless of what administrative arrangements or agencies are involved, ultimately the Commonwealth bears the brunt of responsibility, have they done something in this instance which is constitutionaly impermissible? We presume, although I am not saying, at this time, that the nature of the remedial action is going to be entirely up to the Commonwealth and that, in taking such action, of course, there are the administrative opportunities for those persons or those bodies who may be included or excluded to be heard, as I believe that they were in the state proceedings before this matter came before this Court.

Well, motion for compulsory joinder and the certification of an appealable question is denied.

Mr. Morris: Thank you.

The Court: Thank you.

Mr. Wettick, are you prepared?

SUPREME COURT, U. S.
JUL 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, ...

No. 73-2038

CHURCHILL AREA SCHOOL DISTRICT and TURTLE CREEK AREA SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; and COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. ROBERT MAXWELL,
Attorney for Petitioner,
Churchill Area School District.

Farmers Bank Bldg.,
301 Fifth Avenue,
Pittsburgh, Pa. 15222.

M. E. EVASHWICK,
JAMES C. EVANS,
Attorneys for Petitioner,
Turtle Creek Area School District.

1218 Frick Bldg.,
Pittsburgh, Pa. 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON—SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881 7455

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CONSTITUTIONS:

Pennsylvania Constitution, Art. 3 § 32 (4) 4, 13
United States Constitution:
Amendment V 4
Amendment XIV, Section 1 4

IN THE

Supreme Court of the United States

October Term, ...

No. .....

CHURCHILL AREA SCHOOL DISTRICT and TURTLE CREEK AREA SCHOOL DISTRICT,
Petitioners,

v.

DOROTHY HOOTS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Churchill Area School District and Turtle Creek Area School District, Allegheny County, Pennsylvania (Churchill and Turtle Creek Schools), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in these proceedings on April 18, 1974.

Opinions and Orders Below

The judgment of the United States Court of Appeals for the Third Circuit is not as yet reported and is found in the appendix pps. 1-6. This judgment was issued by a three-judge panel, and a petition for rehearing before a court *en banc* was refused June 4, 1974, as shown in appendix p. 7.

The judgment of the Court of Appeals reviewed the orders of the District Court of May 15, 1973, found in appendix pps. 8-49; of June 13, 1973 found in appendix p. 48; of June 13, 1973, found in appendix p. 49; of October 11, 1973, found in appendix pps. 53-55; and of November 6, 1973, found in appendix pps. 89-91.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 18, 1974. This petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Where a dual school system never existed, does the formation of a large school district from three smaller school districts constitute an unconstitutional act by state authorities and give jurisdiction to the District Court where the small districts whose boundaries were conterminous with their municipal boundaries had minority race (defacto) concentrations of 71%, 52%, and 28% so as to form a school district containing 43% minority race just because other alternatives were available which would have lessened this ratio?

2. Is a school district whose interest may be affected by the action of a Federal District Court in remedying another unconstitutionally formed school district an indispensable party to the litigation so that the District Court has to dismiss the action for lack of jurisdiction if such a district is not made a party?

3. Can a Circuit Court of Appeals refuse to examine the sufficiency of the District Court's jurisdiction when reviewing a refusal of the Lower Court to grant a petition to interplead because such a request is made by the interpleaders who are not parties to the action?

4. Is a school district, not made a party to an action and whose creation is not questioned as to the constitutionality of its formation, subject to being dismembered and/or otherwise involved so as to remedy an unconstitutionally-formed school district under the equitable powers of the Federal District Court?

5. Is a school district, not a party to the litigation but whose boundaries and whose very existence may be affected by the remedy fashioned by the District Court and who presents a petition to interplead as a party-in-interest after an *ex parte* hearing on the merits of the case involving alleged unconstitutional actions of state officials in the formation of an adjacent or near-by school district (no claim or finding being made as to the petitioning districts' formation) and after the order is filed on the matter by the Court but before thirty (30) days has elapsed after the order and before any hearing is held on the remedy phase of the litigation, timely under Rule 24 of the Federal Rules of Civil Procedure and does a refusal of such a petition constitute a denial of due process to the district guaranteed under the Constitution of the United States?

6. Is a school district, not a party to the litigation, who is described by name for the first time as a district whose boundaries and whose existence *is* to be affected in a motion made by the State Board of Education pursuant to the order of court to prepare a plan of desegregation and not described as merely an adjacent and/or near-by district whose boundaries *may* be affected, timely in its application to interplead as a party-in-interest where such application is made within a month after receiving a copy of such motion, within thirteen (13) days after the Court's order setting a hearing date on such motion and some five (5) days before such hearing date which hearing on these matters was continued and actually not heard until months later?

7. Is a school district denied the due process of law under the Constitution of the United States when, although being directly affected by the outcome of the litigation, is permitted to intervene only to attack the remedy fashioned by one of the parties and not on all issues of the litigation?

Constitutional Provisions, Statutes and Rules Involved

The relevant constitutional provisions, Statutes and Rules relevant to the issues in this case are: U. S. Constitution, Amendment V; U. S. Constitution, Amendment XIV, Section 1; Pennsylvania Constitution, Art. 3 § 32 (4); Pennsylvania Public School Code of 1949, Mar. 10, P. L. 30, Article II, § 201; May 11, P. L. 1089, § 1; § 242.1, added 1965, June 23, P. L. 139, § 1, as amended 1967, December 19, P. L. 865, § 1; § 211; Pennsylvania Special Act of 1968, July 8, P. L. 299, No. 150, § 1 *et seq;* Rules of Federal Civil Procedure, Rule 12 (h) (3), 19 and 24. (Appendix pps. 91-106).

Statement of Case

Turtle Creek Area School District and Churchill Area School District are independent school districts located in Allegheny County, Pennsylvania, whose motions to intervene as parties in interest were denied. The amended complaint was by black parents represented by Neighborhood Legal Services, whereby the plaintiffs contended that the General Braddock Area School District was formed by agents of the Commonwealth of Pennsylvania establishing the district so as to concentrate the low income families and a minority race within the district in violation of the Constitution of the United States and certain acts of Congress. (No decision nor finding was made as to the low income family concentration.) The amended complaint did not in any way claim that the formation of those districts surrounding General Braddock Area School District were formed in an unconstitutional manner. The named defendants in the amended complaint filed motions for dismissal of the complaint beause the complaint failed to name necessary party defendants; that is, the school districts surrounding General Braddock Area School District. The District Court denied this request by order of December 8, 1971, found in appendix pps. 109, 110.

The Commonwealth of Pennsylvania, a named defendant, filed a motion to join parties to Rule 21, claiming that certain school districts, including the two named petitioner districts, were necessary so that a proper and complete adjudication could be rendered and justice be done in accord with Rule 19 of the Federal Rules of Civil Procedure. There was no question as to the school districts being subject to the jurisdiction of the District Court as to service of process and without depriving the Court of jurisdiction. This motion was filed four (4) days before the trial was set

for hearing. There was contained in the motion of the Commonwealth of Pennsylvania a request for the certification of said order denying the motion so that an early appeal could be taken on this matter. Appendix pps. 111-116. The motion of the Commonwealth of Pennsylvania was denied on the day of the hearing (317a-318a), appendix pps. 116-117. The Court, in denying the motion of the Commonwealth of Pennsylvania, indicated the thinking of the Court as to what the law issue of the case was when he stated, "We presume, although I am not saying, at this time, that the nature of the remedial action is going to be entirely up to the Commonwealth and that, in taking such action, of course, there are the administrative opportunities for those persons or those bodies who may be included or excluded to be heard, as I believe that they were in the state proceedings before this matter came before this Court." The Court was obviously referring to the school districts and suggested that the school districts' interest was such that they would not be precluded from being fully heard on the matter through other procedures, and therefore, they could protect their interest in another proceeding. The earlier holding of the Court on its refusal to dismiss the action would indicate that the Court believed the interest of the school districts was such that they had no legal interest to protect and, therefore, were not necessary parties.

The hearing proceeded without any amendment being made to the answer of the defendants, which answers denied the allegation of any unconstitutional acts by the state authorities. It was not until after the hearing that the petitioning school districts discovered that no testimony was offered or intended to be offered by the defendants in support of their denial. The order of court of May 15, 1973 was filed and the District Court found (a) the Allegheny County and State Boards of Education maximized racial

segregation within the public schools of the central eastern portion of Allegheny County when these Boards created the General Braddock Area School District and other school districts (finding of fact 51, appendix p. 30); (b) in addition, the County and State Boards created a racially segregated school district and perpetrated exacerbated and maximized recial segregation (findings of fact 56 and 57, appendix p. 33); and (c) the General Braddock School District was formed by the merger of the Braddock School District, the Rankin School District, and the North Braddock School District, where, in 1967, the per centage of non-white students in Bradlock was 63.84, in North Braddock 19.62, and in Rankin 51.30 (opinion p. 569a, appendix p. 29) and after the merger in 1971, the General Braddock School District student black population was 44.98% (finding of fact 37, appendix p. 23).

The District Court, in its opinion, held that the state officials could have done better in balancing the races (findings of fact 41 through 45, appendix pps. 24-27). The plaintiffs did not suggest that the state act, Act 150, by which General Braddock Area School District was formed was unconstitutional or any of the earlier state acts, by which certain of the districts adjacent and near-by were formed, were unconstitutional. No request was made by the plaintiffs for the presentation of their complaint to a three-judge court.

The State Act 150 under which General Braddock School District was formed specifically excluded those school districts which had merged under a prior act known as the State Act No. 299 (see appendix p. 97). The school district of General Braddock Area and the school district of Turtle Creek Area, as they are presently constituted, were surrounded by school districts that had been formed by earlier acts and were, therefore, not required under State Act 150 to merge with other districts in order to

make a larger district (see map presented to Third Circuit Court of Appeals, appendix pps. 107-108).

The order of the District Court of May 15, 1973 ordered the State Board of Education to prepare a plan to " . . . alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts".

Within thirty (30) days of the filing of the Court's order of May 15, 1973, the petitioners moved the District Court to allow both to intervene as parties in interest under Rule 24. (Appendix pps. 45-49 and 49-51). On June 13, 1973, the District Court denied both petitions without an opinion being filed (appendix pps. 48, 50). The petitioners appealed the decision of the District Court to the Third Circuit Court of Appeals. The District Court received a motion filed by the Pennsylvania Board of Education in compliance with the order of the District Court of June 13, 1973 (appendix pps. 51, 52), and did enter an order on October 11, 1973 establishing a hearing date on said motion of the Pennsylvania Board of Education (appendix pps. 53-55). In this same order, the Court granted school districts which were directly affected by the Commonwealth's plan a right to intervene if they so chose to do so, but severely restricted the issues that were permitted to be involved in the hearing and insisted upon the filing of certain objections, as well as a pre-trial statement indicating witnesses, testimony and other evidence that the district proposed to offer, all of which had to be done within thirteen (13) days of the date the order was filed.

Within thirteen (13) days of this order of the District Court, both of the petitioners filed a second motion to intervene as parties in interest under Rule 24. One of the petitioners, Churchill Area School District, filed a petition to

intervene on the restricted basis offered by the District Court in its order of October 11, 1973. The District Court, on November 6, 1973, filed an order denying the motions of the petitioners to intervene as parties in interest and granted the motion of Churchill Area School District to intervene on the limited basis offered by the Court (appendix pps. 56-91). Both petitioners, again, filed an appeal to the Third Circuit Court of Appeals on the refusal of the District Court to permit the petitioning school districts to interplead as parties in interest and to be heard and argue all issues. The appeals were consolidated.

The matter was in front of the Third Circuit Court of Appeals concerning the right of the petitioners to interplead as parties in interest in the action, especially in view of their interests not being properly protected either by testimony and evidence being offered to prove lack of unconstitutional actions by the state authorities in the formation of the General Braddock Area School District, and the failure of the refusal of the defendants to take an appeal within thirty (30) days of the May 15, 1973 order of the District Court so as to protect the interests of the petitioners, and also for purposes of remedy still to be litigated, as well as the basic issues of jurisdiction mentioned by the petitioners and upon which the Third Circuit Court of Appeals refused to act. The Third Circuit Court of Appeals in their opinion (appendix pps. 1 to 7) held that the request of the petitioners for the Court to act, *sua sponte*, would not be an appropriate action for the Third Circuit Court of Appeals to take because it would "upset proceedings before the District Court that have proved satisfactory to all of the present parties to the case". (Footnote 3 in the Circuit Court's opinion.) The Appellate Court dismissed the appeals of petitioners holding that the petitioners were untimely in their application.

The result of the action of the Third Circuit Court of Appeals in sustaining the actions of the District Court is that both petitioners, even though their very existence is in jeopardy, are denied any meaningful hearing in respect to the controlling issues in the case.

REASONS FOR GRANTING THE WRIT

1.

The decision of the Third Circuit Court of Appeals is irreconcilably conflicting with cases in Circuits throughout the United States, with the Supreme Court decisions and Rule 12 of the Federal Rules of Civil Procedure.

A. Scope of review by a Circuit Court upon presentation of an appeal from a District Court by persons denied the right to intervene under Rule 24.

(1) The Supreme Court case of *Mansfield, C. & L. M. Railroad Co. v. Swan,* 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884) established the principle that the first duty of an Appellate Court is, *sua sponte,* if not moved to it by either party, to examine the sufficiency of the plea of jurisdiction of the Trial Court. The reasoning being that the judicial power of the United States is limited and it is only those cases which the Constitution and the laws of the United States establishes jurisdiction of the Federal Court that are permitted to be heard and determined by the Federal judiciary.

(2) Circuit Courts of Appeal followed the *Mansfield* case without making any exceptions to matters involving the appeal from a refusal of the District Court to grant petitions to intervene.[1]

[1] *U.S. v. Heywood-Robinson Co.,* 430 F.(2d) 1077 (C.C.A., 2d Cir., 1970); *Shahmoon Industries, Inc. v. Imperato,* 338 F.(2d) 419 (C.

(Footnote continued on following page)

In the case of *Shahmoon Industries, Inc. v. Imperato*, 338 F. (2d) 449 (C. C. A., 3rd Cir., 1964) the Court at page 351 stated: "The rule, springing from the nature and limits of the judicial power of the U. S., is inflexible and without exception which requires this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of this appellate power, that of all other courts of the U. S., in all cases where such jurisdiction does not affirmatively appear in the records on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

(3) The rule of the *Mansfield* case has been codified in Rule 12 (h) Federal Rules of Civil Procedure, 28 U. S. C.

Rule 12 (h) of the Federal Rules of Civil Procedure (3) states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

In our instant case, the Third Circuit Court of Appeals, when it was suggested by the petitioners, the would-be intervenors, that the District Court did not have jurisdiction over the subject matter held that to allow the would-be intervenors to raise this question when the "parties to the action were satisfied with the procedure" would be

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C.A., 3rd Cir., 1964); *Haynes v. Felder*, 239 F.(2d) 870 (C.C.A., 5th Cir., 1957); *Beck v. Miriani*, 293 F.(2d) 336 (C.C.A., 6th Cir., 1961); *Rock Island Millwork Co. v. Hedges-Gough Lumber Co.*, 337 F.(2d) 24 (C.C.A., 8th Cir., 1964); *Gorsuch v. Fireman's Fund Insurance Co.*, 360 F.(2d) 23 (C.C.A., 9th Cir., 1966).

creating an unwarranted interference with the work of the District Court. It is the position of the petitioners that Rule 12 (h) (3) was violated by the Third Circuit Court of Appeals in that the rule clearly states that the jurisdictional question can be made to appear by suggestion of the parties "or otherwise".

B. Presence or absence of an indispensable party as a matter which determines the jurisdiction of the District Court.

The question of indispensable parties was one of the jurisdictional questions raised by the petitioners and has been held by a number of cases to be a jurisdictional question.[2]

The Third Circuit Court of Appeals failed to examine into this question of indispensable parties and the District Court held that the intervenors were not indispensable parties when refusing the motions of the named defendants under Rule 19.[3] And, apparently, holding for the same reason that the petitioners could not intervene as parties in interest. The Pennsylvania law is different than the laws of many other states involving the same subject matter as the instant case. The State Board of Education in Pennsylvania has no constitutional powers, the only powers it has being legislated powers. The Legislature of Pennsylvania is also limited by the Constitution of Pennsylvania in that the Constitution denies the Legislature the right to pass special legislation in establishing school districts. The Legislature is restricted to passing general legislation and, therefore, under the Constitu-

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[2] *Gorsuch v. Fireman's Fund Insurance Co.*, (*supra*); *Television Reception Corp. v. Dunbar*, 426 F.(2d) 174 (C.C.A., 6th Cir., 1970); *Agrashell, Inc. v. Hammons Products Co.*, (C.C.A., 8th Cir., 1965).

[3] 575a-577a, appendix pps. 35-37.

tion of Pennsylvania the Legislature is not empowered to remedy any unconstitutional formation of General Braddock School District.[4]

The State Board of Education is not mentioned and is not given any powers under the Pennsylvania Constitution as has been done in other states such as Michigan and Virginia.[5] The Pennsylvania State Board of Education is an administrative body and has only legislated authority.[6]

The school districts in the State of Pennsylvania were established by legislative authority as having the same boundaries as the municipalities unless otherwise already established.[7] The only changes permitted in accordance with the Act of 1949 are those under the provisions of the act or as granted in later legislation. Later legislation did permit some changes and, one such act, was the legislative act which established the school district in question, that is, the General Braddock Area School District. This act, commonly known as Act 150 (Act of 1968, July 8, P. L. 299; 24 P. S. 2400 *et seq.*), was a "one-shot" act and, while granting the Pennsylvania State Board of Education restricted authority to establish districts, even against the wishes of the districts or the people therein, gave such authority only for a limited period of time and

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[4] See Article 3, § 32 (4), Constitution of Pennsylvania. "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law, and specifically the General Assembly shall not pass any local or special law: (4) for . . . changing . . . school districts;"

[5] *Bradley, et al. v. Milliken, et al.*, 484 F(2d) 215 (C.C.A., 6th Cir., 1973) and *Bradley v. School Board of City of Richmond, Virginia*, 462 F.(2d) 1058 (C.C.A., 4th Cir., 1972)

[6] *Kentucky Fried Chicken v. Unemployment Compensation Board of Review*, 309 A(2d) 165, 9 Pa.Cmwlth. 474 (1973).

[7] Act of 1949, March 10, P.L. 30, Article II, § 201; 1949, May 11, P.L. 1089, § 1; (24 P.S. § 2-201), appendix p. 91.

for one such action in the creation of the districts. Act 150 has been exhausted by its use and is now only of historical value.

The Act of 1949 is still viable and it does permit mergers of school districts to be voluntarily made amongst the school districts.[8] It, therefore, becomes obvious that certain parties who are not named as parties in the suit are necessary in order that a remedy can be fashioned for the General Braddock Area School District's problems, if such a remedy demands change of "adjacent and/or nearby" school district boundaries. The Detroit case, *Bradley v. Milliken* (*supra*), held that the school districts are indispensable parties in the litigation where they may be affected in devising the remedy. In our instant case, an application under Rule 19 to add adjacent and nearby school districts, was made by the named party defendants and it was refused by the District Court and the District Court refused to certify such order even though requested by the named defendants.

In our instant case, because of the peculiarities of Pennsylvania law, the school districts in Pennsylvania are even more indispensable than they would be in states such as Michigan and Virginia where the Constitutions give power directly to the Boards of Education to make changes in the boundaries of the various school districts.[9] It be-

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[8] Act of 1949, March 10, P.L. 30, Article II, § 242.1, added 1965, June 23, P.L. 139, § 1, as amended 1967, December 19, P.L. 865, § 1; 24 P.S. § 2-242.1. (Appendix p. 91)

[9] In the case of *Wright v. County School Board of Greensville County, Virginia*, 309 F. Supp. 671 (1970), which is the Trial Court decision in the case decided by the Supreme Court of *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196 (1972), the Court held that the District Court could not make a party to the action do what the party had no power to do under the law. In addition,

(Footnote continued on following page)

comes evident that the school districts which may be affected by the remedy are also indispensable parties because they are needed in order to render justice between the parties already before the Court.[10]

C. As to the matter of whether or not the District Court could assume jurisdiction and order redistricting where the complaint, the evidence, and the findings of the Court claimed and determined that the unconstitutional act was the merger of school districts, whose boundaries were conterminous with their municipal boundaries and *de facto* segregation existed in two districts whereby 72% and 51% of the student bodies were minority races and the third school district contained a 28% minority race student body, so as to create a student body consisting of 43% minority race for the reason that the authorities had alternatives with lesser resulting minority ratios.

The District Court, after hearing evidence on the complaint of the plaintiffs, found that even though a dual school system never before existed, that the merger by the state authorities under Act 150 of a school district which had the same boundaries as the municipality and had a black ratio of 72% in its student body with another school district also having the same boundaries as a municipality and having a black ratio of 51% in its student body with a third school district also having the same boundaries as a municipality and containing only 28% black student body so as to form a district constituted a student body of 43% black as having violated the Constitution of the United States so as to give the District Court jurisdiction for the reason, that the Court said, that the State Board

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this Court held that, in keeping with the well-known principle of equity, a decree cannot be made which will bind a person not a party to a proceeding, and the jurisdiction of the court is limited to those over whom it obtains personal service and who, therefore, have their day in court."

[10] *Washington v. U.S.*, 87 F.(2d) 421 (C.C.A., 9th Cir., 1936)

of Education had "alternatives" where there would have been a lesser concentration of black.[11] In making this determination, the District Court ignored the mandates of Act 150, refused to insist on a three-man Court finding Act 150 as being unconstitutional, and determined that there were other better possible combinations which would have lessened the black concentration even more than was done by the State Board of Education even though one of the mandates of Act 150 permitted districts which had been formed under a prior act to avoid any merger under Act 150.[12]

The General Braddock Area School District, as presently constituted, and one of the petitioners, the Turtle Creek Area School District as presently constituted, were completely surrounded by school districts which were so protected by the mandate of Act 150 (See map presented to Circuit Court of Appeals. Appendix p. 107). It is the contention of the petitioners that not only the District Court ignore the restrictions which were binding on the Pennsylvania State Board of Education by Act 150, but even if other combinations were available to the State Board of Education so as to lessen the black concentration, that the District Court should not have taken jurisdiction of this case in view of the acts of the State Board of Education actually reducing the black concentration in two

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[11] 564a-567a, appendix pps. 24-27.

[12] Act of 1968, July 8, P.L. 299, No. 150, § 1 reads, "The State Board of Education, within thirty (30) days of the effective date of this act, shall adopt standards of approval of administrative units comprised of those school districts *which are not in the administrative unit established as a school district under Section 296 of the Act of March 10, 1949 (P.L. 30), as amended*, taking into account the following factors: Topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes, and the capability of providing a comprehensive program of education."

of the constitutent school districts which made up the General Braddock Area School District formed under Act 150. No other cases can be found by the petitioners in all of the United States where a District Court has assumed jurisdiction on such a complaint and upon such evidence and on such a finding by this District Court. The Third Circuit Court of Appeals, even though it had all of the record in front of it concerning this particular jurisdictional question, refused to even examine the matter.

In the case of *Spencer v. Kuegler*, 404 U. S. 1027, 30 L. Ed. (2d) 723, 92 S. Ct. 707 (1972) the Supreme Court sustained the Lower Court and stated: "A Federal Court is precluded from imposing upon school authorities the affirmative duty to cure racial imbalance in the situation of '*defacto*' segregation defined as racial imbalance that exists to no discriminatory action of state authority."

In our instant case, the District Court held that there was a creation of segregation or a maximizing of segregation or an exacerbation of segregation where the evidence disclosed that the resultant district actually had a lesser percentage of black students than two (2) of its constituent districts. It is the contention of the petitioners, under these state of facts, that there was no jurisdiction in the District Court to entertain this action and the action should have been dismissed by the District Court; and on failure of the District Court to dismiss, should have been remanded by the Third Circuit of Appeals to the District Court with instructions to dismiss the action.[13]

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[13] See also *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.(2d) 554 (1971) where the Supreme Court said: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." (p. 24 of 402 U.S. 1, and 1280 of 91 S.Ct. 1267.)

D. As to the matter of the extent of the remedial powers of the District Court in altering school district boundary lines and otherwise affecting them for the purpose of remedying an unconstitutionally-formed school district situation of a neighboring district.

The District Court, in our case, has ordered the alteration of the boundaries of the "unconstitutionally-formed" school district and the boundaries of those "adjacent and/or near-by" districts, as appropriate. The petitioners took a second appeal which was consolidated with the earlier appeal. The second appeal was from the refusal of the petitions of the same two school districts to intervene as parties in interest after having been named as two districts involved in redistricting under the order of the District Court.

The Fourth Circuit has determined that the Federal District Court does not have such broad remedial powers as to affect districts not otherwise found to have been formed in violation of the Constitution in order to remedy constitutional violations found to exist in another district. *Bradley v. School Board of City of Richmond, Virginia, (supra)*[14]

The Sixth Circuit has determined that the Federal District Court does have power broad enough to cross over boundary lines in the reassignment of pupils. *Bradley v. Milliken, (supra)*. At the time of sending this petition to the printer, no decision of the Supreme Court has been handed down on this case although the petition for a writ of certiorari was granted, the matter has been argued, and this point is one of the issues presently before the Supreme Court. In our case, the District Court has before it a plan not only altering the boundaries but eliminating the exist-

[14] See also *Starr v. Parks, (supra)*.

ence of school districts including the two petitioners. This issue was not passed upon by the Third Circuit Court of Appeals and, if this power to remedy is not a matter concerning jurisdiction of the District Court, the refusal of the Court to allow the petitioners to intervene may foreclose the school districts affected from ever having this matter contested by appeal as no appeal was filed by any of the parties within the thirty (30) days after the order of May 15, 1973. (The petitioners asked to intervene so as to be able to file an appeal.)[15]

E. As to the matter of timeliness in presenting a petition to intervene.

In the United States Court of Appeals, District of Columbia, in the case of *Hodgson v. United Mine Workers of America*, 473 F. (2d) 118 (U.S.Ct. of App., Dist. of Col., 1972) the Court stated, on page 125, that: "It is well settled that in ruling on an application for intervention the Court is required to exercise a considerable degree of discretion. Moreover, the various factors which guide the exercise of that discretion may change substantially as the litigation progresses. Where . . . a Court's ruling has discretionary elements based on circumstances which are subject to alteration, the law recognizes the power and responsibility of the Court to reconsider its ruling if a material change in circumstances in fact occur." In holding that the Lower Court was in error in denying the petition to intervene as being untimely, the United States Court of Appeals of the District of Columbia stated on page 129 that: "While timeliness is a prerequi-

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[15] In *Brown Shoe Co. v. United States*, 370 U.S. 606, 82 S.Ct. 1502, ____L.Ed. ____ (1962) the Supreme Court established the pragmatic approach to the determination of the finality of the judgment and held that the order was final and appealable even though the specific remedial plan was not included in the order.

site to any claim for intervention under Rule 24, it is settled particularly where intervention is sought as of right—that the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the Court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties to the case."

It is the petitioners' contention that the District Court erred in deciding that the petitioners were not indispensable parties as not needed to grant complete relief to the parties to the action or whose interest is such that their absence may injure their ability to protect that interest or submit the present party to multiple or inconsistent obligations.[16] The Court suggested that the school districts had only a permissive right to intervene. (See the petitioners' arguments in B, above, in which they suggest that they should have been brought in as indispensable parties under Rule 19.)

In addition to the argument as being necessary parties under Rule 19, Rule 24 requires even a lesser degree of interest than that of an indispensable party.[17] In the case of *Smuck v. Hopson*, 408 F.(2d) 175 (C.C.A., D.C., 1969) the Court overruled the Lower Court for denying the petitioning parents of students from intervening for the purpose of pursuing an appeal. The interest of the parents in their children's education was sufficient enough.

As stated in the case of *Hodgson v. United Mine Workers of America*, (*supra*) in note 37, page 125, "The impact of

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[16] 575a-577a., appendix pps. 35-37.

[17] See *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129, 86 S.Ct. 932, 17 L.Ed. (2d) 814 (1967); *Nuesse v. Camp*, 385 F.(2d) 694 (C.C.A., D.C., 1967).

changed circumstances upon an application for intervention may be illustrated by a simple example. In litigation involving A against B, C applies to intervene on A's side as a right under Rule 24 (a) (2). The Court decides that C's interests are adequately represented by A and denies the application. At some later time, A becomes lax in his prosecution of the case, thereby jeopardizing C's interest. An application by C at this time would warrant a different determination by the Court as to the propriety of C's intervention."

In our instant case, not only did the petitioners allege that the parties who should have protected their interest did not do so (the hearing on the merits was *ex parte*, in that no testimony was presented by the defendants even though the issue of denial of wrong-doing was raised by the pleadings), but also that the interests of the named parties were conflicting to the interests of the petitioners and that the named defendants colluded with the plantiffs. The presence of conflicting interests was set forth in defendants' motion to join parties, (including your appellants, pursuant to Rule 19 which motion was heard on the day of trial.)[18]

The area of conflict was never spelled out, but the denial of the wrong-doing alleged in plaintiffs' complaint was not amended. The parties defendant had filed narrative statements in which they said they were not going to produce any testimony at the time of the hearing, but none of these documents were ever given or brought to petitioners' attention. It was not until after the trial that petitioners' realized that no evidence was going to be presented to refute the plaintiffs' contentions that the actions of the state authorities were guided indirectly at least by racial factors in forming the General Braddock School District. It was not until after the order of court on May 15, 1973 that the

[18] 307a, appendix p. 111.

petitioners were aware that the defendants did not intend to appeal the decision of the District Court. The petitioners filed their petitions for the purpose of taking the appeal as well as for all matters concerning remedy.

The District Court later permitted all school districts who were named in a proposed order of remedy to petition as permissible intervenors to intervene but to be narrowly restricted in what evidence they could offer and on what issues. Both petitioners presented, at that time, petitions to intervene as parties in interest (the second such petition). The District Court again denied these petitions to intervene as parties in interest and appeals were filed and consolidated for argument before the Third Circuit Court of Appeals. One of the petitioners also filed a petition to intervene as a permissible intervenor on the restricted basis offered by the District Court and such petition was granted. The other petitioner, Turtle Creek Area School District, is not a party for any purposes in this action. The Sixth Circuit majority demanded that all of the school districts be heard on all matters of remedy. (See *Bradley v. Milliken*, (*supra*))

The petitioners believe that they are entities entitled to the same due process as any person or entity under the Constitution of the United States.[19] Both petitioners are vested as bodies corporate with all necessary powers to enable them to carry out the dictates of the legislative acts concerning the providing of education for students within their boundaries.[20] The petitioners are empowered to contract in all respects, to sue and be sued, and to levy taxes.

The petitioners' believe that unless they are granted the right to intervene as parties in interest they will be deprived of their rights without due process of law. A number of

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[19] *Bradley v. Milliken, (supra).*

[20] Act of 1949, March 10, P.L. 30, Article II, § 211; 24 P.S. § 2-211. (Appendix, p. 94)

issues other than the matters involving jurisdiction, the extent of the power of the District Court to fashion a remedy to overcome unconstitutional actions of state authorities, and the scope of review of the Appellate Court of an order dismissing a petition to interplead are still involved. The *ex parte* proceeding permitted certain conclusionary facts to be determined without any contest and the basic issues of fact and law to be binding upon the parties to the litigation and possibly affect others even though such findings and legal conclusions are wrong.[21] The Court of Appeals in the case of *Hodgson v. United Mine Workers of America*, (*supra*), on page 131, pointed out the need for permitting the petitioners to intervene when the Court stated: "The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversey are afforded an opportunity to be heard."

2.

(a)

The decisions below involve issues of immense public importance as to the impact of the precedent established by the action with their great and recurring significance and the impact upon the petitioners as well as other school districts involved.

The issue of the extent of the federal judicial power to remedy acts of state officials which violate the constitutional rights of individuals is involved. This power, as exercised in the matters of school segregation, has never been extended in a situation where no dual school system existed, to permit the District Court to force the

[21] See Argument C, above, for one such matter concerning the mandates of Act 150.

changing of the boundary lines and eliminate the very existence of school districts which have not been found to have been formed in an unconstitutional manner but just for the purpose of remedying the acts which were found to be unconstitutional in the formation of a neighboring district. The Supreme Court has a similar issue presently before it in the case of *Bradley v. Milliken*, (*supra*), but in that case the District Court, and apparently the Appellate Court, were not talking about changing boundary lines of the districts but the busing of the students across district lines. The far-reaching impact of the decision on this point which has never been decided by the Supreme Court is apparent.

The issue of the jurisdiction of the District Court to proceed without any school district as a party to the action, either the school district involved or school districts which may and/or are involved in the fashioning of a remedy for the acts of state officials found to have violated the rights of the students in the one school district involved, is of great and far-reaching impact upon the United States. These complaints are being filed throughout the United States and District Courts many have required the school districts to be included in the action while some others have not been requiring their presence.

The issue of jurisdiction of the District Court to hear a complaint and find an unconstitutional act of state officials to have occurred, based on the claims and evidence of the merger of three (3) districts, two containing a *de facto* imbalance of racial minority in the student body with a third district which did not contain an imbalance so as to create a district with a 44% minority where a dual system never existed because the state officials had alternatives whereby the ratio would have been less, is of great impact throughout our Nation. No cases have been

found where this claim has been made or a court has so found jurisdiction to exist. The Supreme Court has not passed on this important issue.

The issue of the scope of review of the Appellate Court in the matter of reviewing a refusal of a District Court to permit a party to interplead is one of recurring happening and should be decided by the Supreme Court. It appears that the Third Circuit Court of Appeals has made a distinction as to the scope of review in interpleader matters which has not been passed upon previously by the Supreme Court. The holding of the Third Circuit Court of Appeals also, in effect, would prolong litigation unnecessarily which is the very reason for the existence of Rule 12 (h) (3) and the right, *sua sponte*, of the Appellate Courts to examine the jurisdiction of the Federal District Courts.

The issue of timeliness of the petitioners in filing their petitions, while it is a factual question to a great extent, the Supreme Court has never passed upon a situation containing the facts of this case, and if the Supreme Court finds that the school districts are not essential parties to the litigation, then it becomes of great concern and great impact throughout the Nation for a determination of timeliness in matters involving these facts. The petitioning school districts were never named as parties defendant by the plaintiffs (the Court mentioned this in the record, 317a, appendix p. 116, when stating ". . . the plaintiff is willing to risk his suit on nonjoinder.") The constitutionality of the formation of the petitioners were never in issue and the boundary lines and very existence was not in issue until the remedy phase of the litigation. The petitioners were found by the Court to not be necessary parties to the litigation on the day the hearing was to start, and the issues presented by the pleadings indicated that those who

were to represent the petitioners denied that the state officials acted in an unconstitutional manner. The petitioners did petition to interplead before the normal appeal period for a final order had elapsed and before any of the issues concerning remedy had been heard. The first petitions were filed even before the petitioners were named specifically as school districts who were to be affected. (Up to the filing of the motion by the Pennsylvania State Board of Education, the only description given by the Court was "adjacent and/or near-by" school districts "where appropriate" . . . to identify petitioners).

The issue of due process is cases involving school desegregation as to school districts whose only connection is in the remedy phase of the litigation is of national importance and has never been passed upon by the Supreme Court. The problem of what issues can be questioned and on what issues can testimony be offered by school districts who have not been named in the litigation and whose formation has not been questioned as to the constitutionality is of national importance especially where other cases have been filed without naming the school districts as parties in the beginning and who are later involved in the fashioning of the remedy.

(b)

The impact that this decision will have upon the petitioners, as well as other school districts, is readily apparent. An examination of the plan presently before the District Court (appendix p. 52) will disclose that the suggested remedy would merge four (4) school districts with a segment of General Braddock Area School District and two (2) school districts with the remaining two (2) segments of the General Braddock Area School District. The administrative problems, the taxing problems, the

new and enlarged busing problems, as well as the budgetary problems and board representation problems can be readily seen. The school districts experienced these same problems from 1968 until 1971 during the formation of a number of these districts and will now be forced to experience the same problems once again on a grander scale. The interests of these school districts are such that the Supreme Court should review the decision of the Third Circuit in order to see if the fundamental constitutional rights of the school districts of due process of law have been protected as well as those of the students and parents of the students involved.

Respectfully submitted,

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